Office-Supreme Court, U.S.
FILED
SEP 20 1983
ALEXANDER L. STEVAS,
CLERK

83-485
No.

IN THE
Supreme Court of the United States
October Term, 1982

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Petitioners,

-vs.-

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN P. SCHOFIELD
Attorney for Petitioners
299 Broadway
New York, N.Y. 10007
(212) 406-2600

Of Counsel:
SCHOFIELD & DIENST
KARL S. KATCHER
EILEEN M. SCHOFIELD

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. Does New York City Local Law 1 of 1975, as amended by New York City Local Law 48 of 1979, (which requires public disclosure of comprehensive personal finances by New York City employees earning over $30,000), provide adequate safeguards to guarantee the individual's right to privacy as provided under the United States Constitution?

2. Was the Circuit Court correct in disregarding the findings of fact by Abraham D. Sofaer, J., in the District Court that the privacy mechanism found in Local Law 48 was without adequate safeguards?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Citations	iii
Petition for Writ	1
Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
1. The Decision Below Upholding LL 48 Conflicts with the Constitutional Guarantees of the Right of Privacy	8
2. The Decision Below Failed to Follow the Findings of Fact Made by the District Court After Trial	9
Conclusion	11

APPENDICES

A—Opinion of the Court of Appeals **1a**

B—Text of Statutory Provision of Local Law 1 .....27a

C—Text of Local Law 48 .....31a

D—Decision of the District Court 35a

E—Order of the District Court 118a

CASES CITED

Carey v. Population Services International, 431 U.S. 678 (1977) 5

Eisenstadt v. Baird, 405 US 438, 453 (1978) 5

Griswald v. Connecticut, 281 U.S. 479 (1965) 5

Hunter v. The City of New York, 58 A.D. 2d 136, 396 N.Y.S. 2d 186 (1st Dept. 1977), aff'd 44 2d 708 (1978) 5

Moore v. East Cleveland, 431 U.S. 479 (1977) 5

Roe v. Wade, 410 U.S. 113, 155 (1973) 5

Shuman v. City of Philadelphia, 470 F.Supp. 449 9

Watkins v. United States, 354 U.S. 178, 200 (1957) 7

Whelan v. Roe, 429 U.S. 589 (1977) 9

Zablocki v. Redhail, 434 U.S. 374 (1978) 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No.

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A.

The opinion of the District Court for the Southern District of New York appears as Appendix D and is reported at 551 F. Supp. 917. That opinion also covered the companion case which was heard jointly on appeal, *James Slevin, et al,* plaintiff-appellees-cross-appellants v. *City of New York, et al,* defendants-appellants-cross appellees, No. 83-7010 and No. 83-7080. A petition for a Writ of Certiorari in the companion case, on information and belief has been filed. These writs involved identical issues.

JURISDICTION

The District Court for the Southern District of New York had jurisdiction over this action pursuant to 28 USC §1331 and 1343 (3).

The final judgment of the Court of Appeals for the Second Circuit was entered on June 22, 1983. This petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York City Local Law 1 of 1975 and New York City Local Law 48 of 1979 are statutory provisions relevant to this petition.

The constitutional and statutory provisions

which are relevant to a determination of the issues raised by this petition are the First, Fourth, Fifth and Ninth Amendments to the United States Constitution and New York City Local Laws 48 of 1979 and 1 of 1975.

The text of the statutory provision of Local Law 1 is set forth in Appendix B, and the text of Local Law 48 in Appendix C.

STATEMENT OF THE CASE

This action was brought on behalf of petitioners to challenge the financial disclosure provisions of New York City Local Law 48 of 1979, New York City Administrative Code §1105-5.0 (hereinafter "LL48") and its unconstitutionality as it applies to the petitioners.

The decision of District Court was rendered on November 24, 1982 and the judgment was entered on January 10, 1983 (Appendix D).

In its decision, the District Court sustained the constitutionality of LL48 insofar as the statute required that all covered employees submit, to the City, a report of their financial interests, but held unconstitutional that provision authorizing public disclosure of these reports.

The District found that public access to the reports of officers and employees of the City, who do not occupy policy making positions, would be violative of their right to privacy under the Fourteenth Amendment. The Court further found that the law established an inadequate procedure to protect

covered employees from an unwarranted invasion of their privacy.

> "Public disclosure of the information called for by LL 48 will seriously affect privacy interests, without advancing any substantial societal need. Plaintiffs are entitled to no less protection of their privacy than ordinary citizens; limits on their privacy rights cannot be justified on this record by special needs related to their actual employment." 551 F. Supp. 917, 948.

The Court of Appeals for the Second Circuit in its June 22, 1983 decision and judgment affirmed the District Court judgment which sustained the constitutionality of the LL 48 filing requirement but reversed the District Court decision disclosure provisions of LL 48 to be unconstitutional.

The Court of Appeals, in its decision, relied upon certain affidavits submitted by defendant-appellant, City of New York, which were part of an application seeking the granting of a new trial. This application was denied *after* the decision of the District Court had been rendered. The District Court's opinion clearly set forth grounds showing that the affidavits in support of the motion for a new trial failed to change the status of the proof offered upon the trial, and failed to enhance the position urged upon the trial by the movant (Appendix D).

Under LL 48 the petitioners would be required to disclose in the financial questionaire confidential material which would be available for public perusal.

In addition, the spouse of the covered employee would also be required to disclose his or her financial

interests in the questionaire. Thus, treating spouses as chattels of each other. This statutory approach is in direct conflict with *Eisenstadt v. Baird*, 405 US 438, 453 (1978) where the Court held that a marital couple is not one entity but clearly two individuals. This legislation infringes upon the fundamental rights of personal and marital privacy without any compelling state interest.

LL 48 violates the plaintiffs' constitutionally-protected interests. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswald v. Connecticut*, 281 U.S. 479 (1965); *Moore v. East Cleveland*, 431 U.S. 479 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services International*, 431 U.S. 678 (1977).

New York City Local Law 48 of 1979 is merely a revision of New York City Local Law 1 of 1975 (Hereinafter called LL 1) both of which involve disclosure of personal information by the covered employee (and spouse) who earn over the threshold amount, that threshold amount being $25,000 in LL 1 and $30,000 in LL 48.

In *Hunter v. The City of New York*, 58 A.D. 2d 136, 396 N.Y.S. 2d 186 (1st Dept. 1977), aff'd 44 2d 708 (1978) LL 1 was declared invalid insofar as there was no protective measure incorporated into the statute which would prevent automatic public disclosure of any and all information which was disclosed.

One of the first LL 1 financial questionaires was filed in 1975 by Deputy Police Commissioner, James Taylor. Soon afterwards, Taylor found his entire net

worth published in the New York Daily News.

LL 1 was revised by LL 48 which provided for a so-called "protective mechanism." This "protective mechanism" merely amounted to a further privacy interference by requiring the privacy-seeker to expound upon reasons why he did not want his financial disclosure information available to the general public. Various rules are promulgated in LL 48 as to the steps and the arbitrary Board of Ethics' decision making procedure in these privacy cases. (See Appendix B & C).

The District Court found that in fact no true protection existed to prevent full disclosure of said questionaire.

Police officers are extremely protective about their personal safety. Rarely has a police officer disclosed his personal residence or private telephone number.

Any necessary financial information required under LL 48 is already available within the Police Department in a more detailed disclosure statement filled out by each officer. However, this questionaire is *not* available for public viewing.

John Guido, Chief of Inspectional Services of the New York City Police Department, conceded that the interests of prevention of corruption, or conflicts of interest will be fully served by disclosure of such information to his Department.

Legislation may be a vehicle for securing information on matters of public concern but this power must

be limited due to privacy interests. In *Watkins v. United States*, 354 U.S. 178, 200 (1957), the Supreme Court stated:

> "(T)here is no . . . power to expose for sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals."

It should be noted that petitioners do not partake in any policy or decision making within their title. They are not proper subjects for public scrutiny. Petitioners are civil servants who achieved their rank in the Police Department through success on competitive exams, after many years of service.

The trial record established that the City Council had no need to draw an arbitrary line of $30,000. LL 48 was written to cover all the important elected and policy-making officers in City Government. The law expressly applies to the Mayor, City Council President, City Councilmen, Borough Presidents and Comptroller, as well as every individual earning in excess of $30,000. LL 48 was not intended to apply to the non-managerial and non-policy-making employees earning more than $30,000.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW UPHOLDING LL 48 CONFLICTS WITH THE CONSTITUTIONAL GUARANTEES OF THE RIGHT OF PRIVACY.

The decision of the District Court upheld the constitutionality of LL 48 insofar as it required petitioners to file annual financial reports with the City Clerk.

The District Court sustained the constitutional challenge to that portion of LL 48 which permitted public disclosure invalid. The decision stated that the public need not have private information about government employees who merely implement policy. The Court stated:

> "The Federal Courts must guard against the possibility that elected government officials faced with pressures for unlimited fiscal disclosure, particularly from the Press upon which they depend for coverage and from which they regularly seek support, may too readily subject career government servants with no significant policy-making functions to the same degree of disclosure appropriate for themselves." 551 F. Supp. 917, 948

LL 48, as currently drafted, fails to provide any true protection to any individual required to file. It does not provide any individual with the right to bring a civil or criminal action against any person's unauthorized use of said information. No true protection exists for any individual properly complying with the statute.

In *Whelan v. Roe*, 429 U.S. 589 (1977), the Supreme Court held that the right to privacy protects an individual's interest in confidentiality and autonomy.

In a 1979 case, *Shuman v. City of Philadelphia*, 470 F. Supp. 449, the Court invalidated a Police Department policy permitting inquiry into any aspect of the personal file of police officers.

The District Court found that public access to the information filed pursuant to LL 48 would have a substantial impact on both confidentiality and autonomy privacy interests. In stating that

> "(p)ublic disclosure will directly materially affect the confidentiality interests of filers and their spouses" 551 F. Supp. 917, 935..

The Court noted that persons likely to use the forms include those seeking to exploit the filer or his spouse for private or commercial gain.

The District Court correctly found that plaintiffs have constitutionally protected privacy rights which were violated by the public disclosure requirements of LL 48.

2. THE DECISION BELOW FAILED TO FOLLOW THE FINDINGS OF FACT MADE BY THE DISTRICT COURT AFTER TRIAL.

The Circuit Court of Appeals substituted its own findings in reaching the decision whereby it reversed that portion of the District Court's opinion involving the public inspection requirement contained in LL 48.

The Circuit Court arbitrarily gave greater credibility to defendant's affidavits in support of a new trial which the District Court found had failed

"... to contradict substantially the Court's conclusion that the privacy mechanism conditions the opportunity to avoid one invasion of privacy on accepting a second even more intrusive invasion." (Appendix E)

The District Court further stated:

"(d)efendants appear to rely on data concerning privacy claims that have thus far been passed upon by the Board of Ethics ... Three years experience with LL 48's privacy mechanism, however, hardly established reliable expectations about the volume of future privacy claims and their dispositions, *especially since the experience does not include the privacy claim of members of the plaintiffs class* (emphasis ours). In any event, the data fails to establish the adequacy of LL 48's privacy mechanism." (Appendix E)

The District Court concluded:

"Finally, defendants' motion ignores the Court's fundamental conclusion that the public disclosure of plaintiff's financial reports would advance no substantial societal interest .... It is doubtful that any privacy mechanism could justify the unnecessary public disclosure of plaintiffs' financial data permitted by LL 48." (Appendix E)

The Circuit Court failed to follow the findings made after the District Court Trial, and unilaterally substituted alleged new findings with no basis on the record before the District Court.

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. (See: Federal Rules of Civil Procedure, Rule 52 (A)).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JOHN P. SCHOFIELD
Attorney for Petitioners
299 Broadway
New York, N.Y. 10007
(212) 406-2600

Of Counsel:
SCHOFIELD & DIENST
KARL S. KATCHER
EILEEN M. SCHOFIELD

APPENDIX "A"
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1312, 1313, 1439—August Term, 1982

Argued: May 25, 1983 Decided: June 22, 1983

Docket Nos. 83-7010, 7012, 7080

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Defendants-Appellants.

JAMES SLEVIN, MARY SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

—against—

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; FRANCIS T.P. PLIMPTON, as Chairman of the Board of Ethics; POWELL PIERPOINT and BARBARA SCOTT PREISKEL as members of the Board of Ethics; and DAVID N. DINKINS as City Clerk,

Defendants-Appellants-Cross-Appellees.

Before:

FEINBERG, *Chief Judge*,
LUMBARD and WINTER, *Circuit Judges.*

City of New York and other defendants appeal from decision of United States District Court for the Southern District of New York, which struck down public inspection provisions of City financial disclosure law. *Slevin* plaintiffs cross-appeal that portion of decision upholding constitutionality of law's filing requirements.

Affirmed in part and reversed in part.

MURRAY A. GORDON, New York, NY (Gordon, Shechtman & Gordon, P.C., Richard M. Betheil, of Counsel), *for Plaintiffs-Appellees-Cross-Appellants.*

JOHN P. SCHOFIELD, New York, NY (Schofield & Dienst, New York, NY, Richard A.

Dienst, Karl S. Katcher, Eileen M. Schofield, of Counsel), *for Plaintiffs-Appellees*.

PAUL T. REPHEN, Assistant Corporation Counsel of the City of New York (Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, Leonard Koerner, Assistant Corporation Counsel, of Counsel), *for Defendants-Appellants-Cross-Appellees*.

FEINBERG, *Chief Judge*:

Defendants-appellants, the City of New York and various City officials, appeal from that portion of a decision of the United States District Court for the Southern District of New York, Abraham D. Sofaer, J., that struck down the public inspection provisions of a financial disclosure law enacted by the New York City Council. This is a consolidated appeal: the named plaintiffs in *Slevin* are employees of the New York City Fire Department and their spouses suing for themselves and others similarly situated; the similar suit in *Barry* is brought by employees of the Police Department and their spouses. The *Slevin* plaintiffs cross-appeal from that portion of the district court decision that upheld the constitutionality of the law insofar as it requires plaintiffs to file annual financial reports with the City Clerk. The opinion of the district court is reported at 551 F. Supp. 917 (1982). We affirm the district court's decision in part, and reverse in part.

I. *Background*

In 1975, after several years of study, the New York City Council enacted Local Law 1, New York City Admin. Code § 1106-5.0. As originally passed, Local Law 1 required a variety of City officials, candidates for City office, and all City employees whose salary was $25,000 or greater, to file annual reports disclosing certain financial information. The law made the reports available for public inspection. Local Law 1 was upheld by the New York State Supreme Court in Hunter v. City of New York, 88 Misc. 2d 562 (1976). On appeal, however, the Appellate Division, First Department, invalidated the law. Hunter v. City of New York, 396 N.Y.S.2d 186 (lst Dept. 1977), aff'd, 44 N.Y.2d 708 (1978). The *Hunter* court recognized that the purpose of the law, to deter corruption and conflicts of interest among City employees, was valid. Nonetheless, the court determined that Local Law 1 was invalid insofar as it contained no mechanism to prevent automatic public disclosure of all information provided. Hunter v. City of New York, supra, 396 N.Y.S.2d at 189-90.

In response, the City Council passed Local Law 48 (hereafter LL 48), which took effect in July 1979. LL 48 amends Local Law 1 to permit covered employees to assert privacy claims with respect to any of the information the statute requires. As amended, the City's financial disclosure law requires annual financial reports from most elected and appointed officials, candidates for City office, and all civil service employees with an annual salary equal to or greater than $30,000.[1] Covered employ-

[1] LL 48 requires the following individuals to file:

(i) the Mayor, City Council President, City Councilman, Borough Presidents, and Comptroller, and candidates for such positions (Sec. 1106-5.0a, subd. 1,2); and

ees and their spouses must provide extensive information about their personal finances, including, among other items, the identity of professional organizations from which the employee or a spouse derives $1,000 or more in income during the preceding year; the source of capital gains of $1,000 or more, other than from the sale of a residence; the source of gifts or honoraria of $500 or more; indebtedness in excess of $500 that is outstanding for 90 days or more; and the nature of investments worth $20,000 or more.[2] Intentional violations of these reporting requirements are punishable by imprisonment not to exceed one year or a fine not to exceed $1,000, or both.

The reports must be filed with the City Clerk, and may be inspected by a member of the public on request. Unlike its predecessor, however, LL 48 explicitly permits covered individuals to request that any item or items in their reports be withheld from public inspection on the ground that inspection "would constitute an unwarranted invasion of his or her privacy." In general, a privacy claim may be made at any time. When a request for access is pending, however, a privacy claim cannot be asserted for the first time, although a prior privacy claim can be supplemented on notice of a request for access.

When an inspection request is made and a privacy claim has been asserted, LL 48 requires the public members of the City's Board of Ethics[3] to consider the

(ii) [e]ach agency head, deputy agency head, assistant agency head, member of any board or commission other than a member of a board or commission who serves without compensation and each city employee who is a member of the managerial pay plan or whose salary is thirty thousand dollars a year or more. . . . (Sec. 1106-5.0a, subd. 3).

2 The section of the statute detailing the information required is reprinted in full as an appendix to this opinion.

3 The Board of Ethics consists of "public members of the board of ethics appointed pursuant to section twenty-six hundred of the char-

following factors in determining whether public inspection would constitute an unwarranted invasion of privacy:

(a) whether the item is of a highly personal nature;

(b) whether the item in any way relates to the duties of the positions held by such person;

(c) whether the item involves an actual or potential conflict of interest.

The Board must file a written decision with the City Clerk, who may then disclose only those portions of the requested financial statement that are not exempted on privacy grounds.

After LL 48 was passed, two class actions were filed to contest it. In August 1979, Fire Department Battalion Chiefs, Deputy Chiefs, Medical Officers, and their spouses[4] sued the City of New York, its Board of Ethics and the individual members thereof, the Mayor of the City of New York, and the City Clerk, seeking to enjoin the application of LL 48 to the plaintiff class. Slevin v. City of New York, No. 79 Civ. 4524 (S.D.N.Y.). (For convenience, we will refer to the defendants collectively as "the City"). Shortly afterwards, New York City Police Department Captains, Deputy Chiefs, Inspectors, Deputy

---

ter" of the City of New York. § 1106-5.0, subd. 4f. At the present time, the Board consists of Francis T.P. Plimpton, Powell Pierpoint, and Barbara Scott Preiskel.

4 According to the record before us: At the time of the hearing in this case, the Fire Department employed only 78 Deputy Chiefs, 278 Battalion Chiefs, and 10 medical officers out of a total of approximately 9,500 uniformed employees. Deputy and Battalion Chiefs are responsible for supervising firefighting operations and building inspections. Battalion Chiefs supervise five to eight fire companies; deputy chiefs supervise three or four battalions. Medical officers treat firefighters and determine their fitness for duty.

Inspectors, Lieutenants, Police Surgeons, and their spouses[5] filed the companion action, Barry v. City of New York, No. 79 Civ. 4627 (S.D.N.Y.), against most of the same defendants, seeking to enjoin the application of LL 48 to the plaintiff class. The plaintiff officers in both cases are "uniformed city employees, occupying competitive civil service positions, who earn in excess of $30,000 annually." Slevin v. City of New York, supra, 551 F. Supp. at 923. The district court issued a preliminary injunction enjoining the application of LL 48 to the *Slevin* plaintiffs, and later expanded the injunction against defendants to cover the *Barry* plaintiffs. The cases were then consolidated and tried on the merits.

In a wide-ranging attack on the statute, plaintiffs claimed below that as applied to them, LL 48 violated their constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. In a comprehensive opinion, Judge Sofaer sustained the constitutionality of the statute's filing requirements, but struck down the public inspection provisions as an unwarranted invasion of plaintiffs' privacy.

On appeal, the City challenges that portion of the lower court decision invalidating LL 48's public inspection provisions. The *Slevin* plaintiffs contend in their cross-appeal that the statute should be struck down in its entirety;

---

5 According to the record before us: At the time of the hearing in this case, the *Barry* plaintiffs included 22 deputy chiefs, 39 inspectors, 81 deputy inspectors, 250 captains, 21 police surgeons and some lieutenants. Captain is the highest rank that can be attained through civil service examination. Captains normally command a precinct of 100 to 400 men. Lieutenants are a rank below captain, but the plaintiff lieutenants are those "designated as Supervisor of Detective Squad and/or Special Assignment," and apparently have a salary and responsibilities commensurate with those of police captains. Police surgeons treat police officers and determine their fitness for duty. All ranks above captain are appointed by the Police Commissioner, and involve significant supervisory responsibilities.

the *Barry* plaintiffs argue only that the district court was correct in striking down the law's public disclosure provisions. For simplicity, we deal first with the arguments raised by the City in its appeal, and by the *Slevin* plaintiffs in their cross-appeal.

II. *The City Appeal and the Slevin Cross-Appeal*

We note as an initial matter that the Supreme Court has dismissed for lack of a substantial federal question three appeals from state court decisions upholding financial disclosure laws. Montgomery County v. Walsh, 336 A.2d 97 (Md. 1975), appeal dismissed, 424 U.S. 901 (1976); Fritz v. Gorton, 527 P.2d 911 (Wash. 1974) (in banc), appeal dismissed, 417 U.S. 902 (1974); Stein v. Howlett, 289 N.E.2d 409 (Ill. 1972), appeal dismissed, 412 U.S. 925 (1973). These dismissals are dispositions on the merits, and are binding on "the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). But although these dismissals "caution us against finding [LL 48] unconstitutional," Plante v. Gonzalez, 575 F.2d 1119, 1126 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979), they cannot, as the district court put it, "fairly be said to preclude all of plaintiffs' challenges." 551 F. Supp. at 924. As the district court recognized, the statute challenged in this case, and the issues raised, differ in important respects from the statutes and issues considered in the state court decisions cited above. Id. Moreover, all three dismissals occurred prior to two Supreme Court decisions that recognized a constitutional interest "in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977); Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977). Accordingly, this court

must "undertake an independent examination of the merits." Mandel v. Bradley, supra, 432 U.S. at 177.

A. *Right to Privacy*

The central issue in this case is whether LL 48 violates plaintiffs' right to privacy. The exact nature and scope of the right to privacy has never been fully defined. In *Whalen v. Roe*, however, the Supreme Court summarized the relevant case law as follows:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

429 U.S. at 598-600 (footnotes omitted). These two interests have been characterized by the Fifth Circuit as interests in "confidentiality" and in "autonomy", respectively. Plante v. Gonzalez, supra, 575 F.2d at 1128.

The autonomy branch of privacy protects personal choice in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Paul v. Davis, 424 U.S. 693, 713 (1976). It is unclear whether financial disclosure laws significantly implicate any interests protected by the autonomy strand of the right to privacy. The Fifth Circuit has concluded that the autonomy interest does not cover "financial privacy." Plante v. Gonzalez, supra, 575 F.2d at 1132; see also O'Brien v. DiGrazia, 544 F.2d 543, 545 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977). The Fifth Circuit reasoned that financial regulations, such as tax laws, are common in this society, and that "[t]he indirect effects caused by financial disclosure pale by comparison" with

the effects of other regulations. Plante v. Gonzalez, supra, 575 F.2d at 1131. The court concluded that although "financial disclosure may affect a family. . . . any influence does not rise to the level of a constitutional problem." Id. The district court in this case, however, after a careful analysis, decided that financial disclosure laws may sometimes "substantially, albeit indirectly, affect recognized autonomy interests." 551 F. Supp. at 928. As will be seen below, however, it is not necessary for us to decide the general applicability of the autonomy branch of privacy to financial disclosure laws.

The confidentiality branch of the right to privacy was at issue in Whalen v. Roe, supra. In that case, the Supreme Court upheld a New York statute authorizing the state to record the names and addresses of patients who received prescriptions for certain drugs, but stated that individuals have a protectible "interest in avoiding disclosure of personal matters." 429 U.S. at 599. The existence of that interest was reaffirmed in Nixon v. Administrator of General Services, supra, 433 U.S. at 457, a case in which the Supreme Court upheld an Act providing for the screening of former President Nixon's presidential materials to segregate official documents for public preservation from personal documents for return to Mr. Nixon.

The nature and extent of the interest recognized in *Whalen* and *Nixon*, and the appropriate standard of review for alleged infringements of that interest, are unclear. See J.P. v. DeSanti, 653 F.2d 1080, 1087-91 (6th Cir. 1981) (questioning whether *Whalen* and *Roe* created any general right to non-disclosure of personal information against which infringing government actions have to be balanced). Most courts considering the question, however, appear to agree that privacy of personal matters is a

protected interest, see, e.g., Plante v. Gonzalez, supra, 575 F.2d at 1135; United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-78 (3d Cir. 1980); Schachter v. Whalen, 581 F.2d 35 (2d Cir. 1978), and that some form of intermediate scrutiny or balancing approach is appropriate as a standard of review, see Slevin v. City of New York, supra, 551 F. Supp. at 930 (listing cases). The Supreme Court itself appeared to use a balancing test in Nixon v. Administrator of General Services, 433 U.S. 425, 458 (1977). Moreover, an intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest. See Plante v. Gonzalez, supra, 575 F.2d at 1134. With these principles in mind, we turn to plaintiffs' contentions that the filing and public inspection provisions of LL 48 violate both the confidentiality and the autonomy strands of the right to privacy.

1. *The Filing Requirement*

The district court reached the following assessment with respect to LL 48's requirement that each covered individual file a financial report with the City Clerk:

> The evidence established that autonomy and confidentiality interests will be somewhat affected by the filing requirement, but that governmental interests in deterring and detecting conflicts of interest and venality will be furthered sufficiently to justify that requirement.

Slevin v. City of New York, supra, 551 F. Supp. at 931. After reviewing the record, we agree. Plaintiffs contend

that LL 48 impairs their "constitutionally protected privacy rights in the spousal relationship" because, as the district court recognized, "[f]iling will necessarily compromise a spouse's desire to keep secret his or her finances from the filing employee. . . ." 551 F. Supp. at 931. The district court also recognized, however, that filing of information regarding spouses was necessary to make LL 48 effective. And the district court went on to conclude that "no evidence suggested that [the filing requirement] would significantly affect the decisions whether to marry, whether and when to procreate, or other family decisions heretofore held protected by the autonomy branch." Id. at 932.

Plaintiffs concede that this conclusion would be valid if LL 48 furthered a substantial government purpose. We think the statute as a whole plainly furthers a substantial, possibly even a compelling, state interest. The purpose of the statute is to deter corruption and conflicts of interest among City officers and employees, and to enhance public confidence in the integrity of its government. Hunter v. City of New York, supra, 396 N.Y.S.2d at 187. In addition, as the district court noted, "[f]inancial disclosure laws also derive considerable strength from the benefits widely felt to be derived from openness and from an informed public." 551 F. Supp. at 921.[6] The Supreme Court has recognized a compelling state interest in the maintenance of an honest civil service, see Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977), and that "[a]n informed public is essential to the nation's success, and a

---

6 The district court went on to conclude that in this case the public right to know was outweighed by plaintiffs' privacy interests, since plaintiffs do not occupy policymaking positions. As indicated below, we do not think that on this record the distinction between policymaking positions and nonpolicymaking positions is conclusive.

fundamental objective of the first amendment." Slevin v. City of New York, supra, 551 F. Supp. at 921 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)). Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread, see Slevin v. City of New York, supra, 551 F. Supp. at 919 n.1, and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest.

Plaintiffs argue, however, that the filing requirement is unnecessary because all the information obtained through LL 48 is already available to the City under existing procedures, where necessary to further an authorized investigation. We agree with the district court, however, that "[t]he City is not required to rely. . . on departmental mechanisms to achieve its aims; it is entitled to opt for a centralized system of monitoring its employees' finances, even if the new procedure is less comprehensive than some departmental procedures." 551 F. Supp. at 933.

Plaintiffs in *Slevin*, which primarily involves officers of the Fire Department, also claim that LL 48 is unnecessary because there is no history of or opportunity for corruption among Fire Department Chief or Medical officers. The City contends that Fire Department employees face a variety of opportunities for corruption or conflicts of interest; e.g., a Fire Department Chief or his spouse might hold real estate investments in an area of his command subject to inspections or enforcement proceedings, or a medical officer might receive payments from a firefighter who desires to remain on paid sick leave. Plaintiffs succeeded in discrediting much of the City's evidence on this issue, and the district court determined

that "opportunities for corruption" among the Fire Department plaintiffs were "limited". 551 F. Supp. at 932-33. The court went on to find, however, that "[c]orruption and more subtle conflicts of interest are possible in each group of plaintiff employees." Id. at 933. We agree with this assessment. In our view, the City Council could reasonably conclude that LL 48 would help deter corruption and conflicts of interest in the Fire Department, despite its "virtually corruption-free history." 551 F. Supp. at 932 n.11.

Plaintiffs also challenge the establishment of a $30,000 threshhold disclosure level as both underinclusive and overinclusive. We consider that argument at some length below, in the context of our discussion of the public inspection provision of LL 48.

Plaintiffs' final privacy argument with respect to the filing requirements is that LL 48 lacks adequate security precautions to prevent inadvertent disclosure of financial reports. Cf. Whalen v. Roe, supra, 429 U.S. at 605-06 (discussing importance of security measures); United States v. Westinghouse Electric Corp., supra, 638 F.2d at 580. Plaintiffs do not point to any instances in which material covered by a privacy claim has been inadvertently released since the statute was enacted in 1979. We would expect that the City will treat the LL 48 reports "with the same degree of confidentiality now accorded private information in the City's personnel records," Slevin v. City of New York, 551 F. Supp. at 949 n.21, and that it will take adequate precautions to prevent inadvertent disclosure of material protected by a privacy claim. On this record, we cannot say that the statute must be invalidated for lack of adequate security measures.

2. The Public Inspection Requirement

More difficult constitutional questions are raised by the provision of LL 48 that permits public inspection of plaintiffs' annual financial reports. The adverse effect of public disclosure on privacy interests is considerably greater than the effect of disclosure to the City; at the same time, the City's interest in public inspection is weaker in significant respects than its interest in obtaining financial information for internal review. Nonetheless, we think the statute, as strengthened by the privacy claim procedures, withstands constitutional scrutiny even with respect to the broad public inspection requirement.

As the district court noted, "[t]he degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than disclosure to government officials." 551 F. Supp. at 934 (citations omitted). Plaintiffs contend that public disclosure will impair their autonomy interests by forcing them to redefine their marital and family relationships. The district court found that "public filings will reveal in some instances facts that could damage a variety of associations and relationships." 551 F. Supp. at 935. In addition, the district court found that "[p]ublic disclosure will directly and materially affect the confidentiality interests of filers and their spouses," id., citing a variety of examples, such as the possibility of an embarrassing revelation "that one lives above or below one's means." Id.

We recognize that public disclosure of financial information may be personally embarrassing and highly intrusive. Unlike the district court, however, we think that the statute's privacy mechanism adequately protects plaintiffs' constitutional privacy interests.

An employee filing a financial report may make a claim of privacy with respect to any item of information sought by the City by explaining in writing the reasons for the request. Privacy claims are not adjudicated by the Board of Ethics unless a request for public inspection is made; while this may leave the filer in a state of uncertainty as to the eventual outcome of his privacy claim should an inspection request ever be made, we do not think that by itself is of constitutional significance. If a privacy claim has been made and someone requests access to the claimant's report, the matter is referred to the Board of Ethics for evaluation. As indicated above, the Board must consider three factors in evaluating a privacy claim: whether the item is highly personal; whether it relates to the claimant's duties; and whether the item involves a possible conflict of interest.

We do not think that the right to privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest. Nor do we think the release of information that is not "highly personal" rises to the level of a constitutional violation.

Moreover, the record does not support plaintiffs' contentions that the privacy mechanism is inadequate. According to an affidavit of one of the members of the Board of Ethics, twenty-six privacy claims have come before the Board. Sixteen were granted, six were withdrawn, and one was "otherwise disposed of." Only three privacy claims were denied, apparently because insufficient information was provided in support of the claims.

When an inspection request is made, the filer is notified of the identity of the person seeking access. According to the City, the filer is then afforded the opportunity to present additional material in support of his privacy

claim. If the privacy request is denied, the City informs us that the filer has ten days in which to seek reconsideration by the Board or judicial review. In light of the actual experience with the privacy procedure discussed above, we think this process affords plaintiffs an adequate opportunity to contest the disclosure of any information whose release might violate their right to privacy.

The *Slevin* plaintiffs argue that the affidavits relied on by the City to support its contentions with respect to the actual operation of the privacy claim mechanism are not properly before this court. According to plaintiffs, the affidavits, which were submitted to the district court after trial on a motion for a new trial, are inadmissible because they consist primarily of matter alleged on information and belief, and because plaintiffs did not have an opportunity to conduct discovery, cross-examine the affiants, or introduce rebuttal evidence. Ordinarily, we might be inclined to remand the case to the district court to clarify this issue. But we see no need for that procedure here.

The contested affidavits were before the district court on defendants' motion for a new trial, which was denied even in the absence of any rebuttal evidence from the plaintiffs. Moreover, plaintiffs do not contest the accuracy of the information regarding the actual disposition of privacy claims; indeed, they rely on the same facts to support their claim that the privacy procedures are inadequate.

Plaintiffs characterize defendants' statements that filers may supplement their privacy claims when a request for access is made, and that filers are given adequate time to seek judicial review when a privacy claim has been denied as "a hitherto unknown construction of the statute," but do not actually contest the accuracy of these assertions. We note that Judge Sofaer relied on the

affidavits in finding that in practice filers are afforded a "meaningful opportunity for judicial review." The statute itself explicitly authorizes the Board of Ethics to "establish procedures for the consideration" of privacy requests. Accordingly, it is clearly within the Board's power to afford filers an opportunity to supplement existing privacy claims when a request for access is made, and to provide an adequate opportunity to seek judicial review when a claim is denied. We therefore rely on the City's assurances that the privacy mechanism so operates in practice.

The City further informs us that a filing employee may specify that he does not want information released to particular persons or groups, and that the Board of Ethics may deny an inspection request if the Board "has reason to believe that the person or organization making the request is not acting in good faith or is attempting to obtain the information for some inappropriate or improper purpose." Again, plaintiffs claim that this is a novel and possibly erroneous construction of the statute, and that there is no indication in the record that the Board of Ethics operates in this fashion. Nothing in the statute requires the Board of Ethics to consider the identity of the person seeking access, but nothing appears to bar the Board from doing so either. Whether or not the Board follows the sensible practice of considering the identity of the person requesting access, however, we think the privacy procedure is adequate to protect plaintiffs' rights. We note by way of comparison that courts have upheld financial disclosure laws that hit much closer to home and do not have any similarly broad privacy mechanism. See, e.g., Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) (upholding Ethics in Government Act). However,

in view of the apparent confusion as to the exact operation of the privacy mechanism, the City might be well advised to explain it more fully to the affected City personnel.

In any event, we think the City's interest in public disclosure outweighs the possible infringement of plaintiffs' privacy interests. Plaintiffs argue that the City's efforts to deter corruption and conflicts of interest would be as well served by disclosure to the City only as by public disclosure. We disagree.

In the City's view, public disclosure will significantly bolster its efforts to deter official malfeasance. The City cites the example of the 1972 Knapp Commission investigation, which uncovered extensive corruption in the Police Department, and determined that despite charges of corruption, no serious official investigation was made until the press publicized the allegations. According to the City, public disclosure of financial reports will spur City agencies and officials to be aggressive in their efforts to police corruption, if only for fear that evidence of misconduct might be found in a financial report and publicized by the press, a public interest group, or a vigilant citizen. In addition, the City contends that public disclosure will enhance public confidence in the integrity of City government if only because the reports will demonstrate that most City officials and employees are honest and not subject to conflicts of interest in the performance of their duties.

The district court was not persuaded by the City's arguments. But as the Supreme Court noted in Whalen v. Roe, supra, 429 U.S. at 597 (footnotes omitted);

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole

> or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

In this case, we cannot say that it was unreasonable for the City Council to conclude that public disclosure would materially advance the City's attempt to prevent corruption and conflicts of interest.

As noted above, plaintiffs also challenge the $30,000 threshold disclosure level. Plaintiffs contend that unlike the plaintiffs in Plante v. Gonzalez, supra, 575 F.2d 1119, or in Duplantier v. United States, supra, 606 F.2d 654, they are not all public figures, nor do they all occupy policymaking positions "with substantial discretion over the disposition of valuable goods." They conclude that the pro-disclosure balance reached in *Plante* and *Duplantier* is therefore inappropriate here. But the fact that many of the plaintiffs are not public figures or policymaking officials does not immunize them from all possibilities of corruption or conflict of interest. Indeed, as noted earlier, the district court in holding the filing requirement constitutional found that corruption and conflicts of interest are possible in each group of plaintiffs. Given the magnitude of the City's interests, we think the constitutional balance still tips in favor of permitting public disclosure.

The district court decided that the potential for corruption does not justify "across-the-board, public disclosure of finances." 551 F. Supp. at 940. In addition, the district judge found that the $30,000 level was both overinclusive and underinclusive. Id. at 940-44.

We recognize that full disclosure is burdensome, and that some City employees earning less than $30,000 might have opportunities for corruption, while others earning

more than $30,000 might not. Moreover, we agree with the district court that the statute would be better if it specified the "particular job categories" that should be subject to disclosure, and defendants themselves concede that "it may now be time" to consider raising the threshhold for reporting "to take into account the effect of inflation since 1979." Nonetheless, we cannot say that the statute must therefore fall. Ordinarily, legislative classifications of this sort must stand unless "very wide of any reasonable mark." Buckley v. Valeo, 424 U.S. 1, 83 n.111 (1976) (per curiam). And the City argues that there are too many positions involved to permit classification by particular job categories, a determination that it is difficult for a court to characterize as erroneous. In any event, however, the burden imposed by an imprecise classification, and by the broad nature of the required disclosure, is mitigated by the statute's privacy mechanism, which permits covered employees to challenge the proposed release of irrelevant "highly personal" information. Accordingly, we cannot say that the law is unconstitutionally overbroad or that it violates the constitutional right to privacy.

B. *Additional Constitutional Claims*

Plaintiffs also contend that LL 48 violates their rights under the Fourth and First Amendments. We agree with the district judge that there is little merit to these arguments.

1. *Fourth Amendment*

Plaintiffs contend that they have a reasonable expectation of privacy with respect to the disclosure of financial information, and that therefore the Fourth Amendment shields them from compelled disclosure. It is doubtful,

however, whether the Fourth Amendment applies in this context. See Whalen v. Roe, supra, 429 U.S. at 604 n.32. Moreover, as the district court noted, plaintiffs plainly have no reasonable expectation that the information sought by LL 48 can be withheld from their employers. 551 F. Supp. at 925. In addition, even if plaintiffs have a reasonable expectation of privacy with respect to public disclosure, the Fourth Amendment prohibits only unreasonable inquiries. Cf., e.g., California Bankers Association v. Shultz, 416 U.S. 21, 59-70 (1974); Camara v. Municipal Court, 387 U.S. 523, 536-39 (1967). As stated above, we cannot say that the demands of LL 48, as limited by its privacy mechanism, are unreasonable.

2. *First Amemdment*

Plaintiffs also contend that LL 48 impairs their First Amendment rights of freedom of association and speech, because it will force disclosure of organizational activities and affiliations. The district court found, however, that plaintiffs failed to demonstrate that LL 48 would "significantly inhibit the exercise of their first amendment rights." 551 F. Supp. at 927. We agree with the district court that on this record the threat that LL 48 will significantly interfere with plaintiffs' First Amendment rights is "too remote". See id.; Plante v. Gonzalez, supra, 575 F.2d at 1132-33.

II. *The Barry Appeal*

The *Barry* plaintiffs challenge only the public inspection provisions of LL 48. For the most part, their arguments parallel those of the *Slevin* plaintiffs, and the *Barry* plaintiffs incorporate by reference the arguments presented by the *Slevin* plaintiffs. The principal difference

between the two groups of plaintiffs, for purposes of this appeal, is the different opportunities for corruption and conflicts of interest available to each group. Unlike the Fire Department, the Police Department "has a history of pervasive corruption." Slevin v. City of New York, supra, 551 F. Supp. at 933 n.12. Moreover, the district court found that "corruption in the Department . . . has markedly diminished, but it persists." Id. Thus, the City's justification for seeking financial disclosure from the *Barry* plaintiffs and for permitting public inspection of their reports is stronger than in the case of the *Slevin* plaintiffs. Accordingly, our decision of the *Slevin* appeal controls the disposition of the *Barry* appeal.

Conclusion

After reviewing the record and considering all of plaintiffs' arguments, we conclude for the reasons stated above that LL 48 is constitutional in its entirety as applied to the plaintiffs. Accordingly, we affirm that portion of the district court's opinion relating to the filing requirements, and reverse that portion of the opinion dealing with the public inspection requirements.

b. The report shall contain the following information:

1. List the name, address and type of practice of any professional organization in which the person reporting or his spouse, is an officer, director, partner, proprietor or employee, or serves in any advisory capacity, from which income of one thousand dollars or more was derived during the preceding calendar year.

2. List the source of each of the following items received or accrued during the preceding calendar year by the person reporting or his spouse.

(a) any income for services rendered, other than any source of income otherwise disclosed pursuant to paragraph one, of one thousand dollars or more;

(b) any capital gain from a single source of one thousand dollars or more other than from the sale of a residence occupied by the person reporting;

(c) reimbursement for expenditures of one thousand dollars or more in each instance;

(d) honoraria from a single source in the aggregate amount of five hundred dollars or more;

(e) any gift in the aggregate amount or value of five hundred dollars or more from any single source received during the preceding year, except as otherwise provided under the election law covering campaign contributions.

3. List each creditor to whom the person reporting or his spouse was indebted for a period of ninety

consecutive days or more during the preceding calendar year in an amount of five thousand dollars or more.

4. List the identity of each investment and each parcel of real property in which a value of twenty thousand dollars or more was held by the person reporting or his spouse at any time during the preceding calendar year, based on the cost thereof or when acquired by means other than purchase, an estimate of the value at the time of receipt.

5. List the identity of each trust or other fiduciary relation in which the person reporting or his spouse held a beneficial interest having a value of twenty thousand dollars or more during the preceding calendar year.

6. (a) Indicate if the total amount of income received from each and every source listed (1) pursuant to the provisions of paragraph one and subparagraphs a, b and c of paragraph two of this section is at least one thousand dollars but less than five thousand dollars, at least five thousand dollars but less than twenty-five thousand dollars; at least twnety-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more; and (2) pursuant to the provisions of subparagraphs d and e of paragraph two of this section is less than one thousand dollars; at least one thousand dollars but less than five thousand dollars; at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more.

(b) Indicate if the total amount of indebtedness owed each creditor listed pursuant to paragraph three of this section was at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or over five hundred thousand dollars.

(c) Indicate if the total value of each investment and real property interest identified pursuant to paragraph four of this section and each beneficial interest identified pursuant to paragraph five of this section was during the reporting period, at least twenty thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or five hundred thousand dollars or more.

APPENDIX "B"
STATUTORY PROVISIONS OF LOCAL LAW 1

1. New York City Local Law 1 of 1975, New York City Administrative Code §1106-5.0:

"Annual disclosure—a. The following persons shall file with the city clerk a report disclosing certain financial interests as hereinafter provided:

1. Each elected officer described in sections four, twenty-three, twenty-four, eighty-one and ninety-one of the New York City charter shall file such report not later than June thirtieth, nineteen hundred and seventy-five and thereafter not later than June thirtieth of each year except, in the year in which such elected officer is a candidate for re-election or a candidate for one of the other offices hereinabove set forth, then and in that event such elected officer, as a candidate, shall file on or before the last day for filing his designating petitions pursuant to the election law.

2. Each person who has declared his intention to seek nomination or election, or on whose behalf a declaration or nominating paper or petition has been made or filed which has not been declined, for an office described in paragraph one of subdivision a of this section shall file such report on or before the last day for filing his designating petitions pursuant to the election law.

3. a. Each head of an administration, each deputy administrator, assistant administrator, each agency head or board member of such agency, commissioner, deputy commissioner, assistant commissioner, and each city employee whose salary is twenty-five thousand dollars a year or more shall file such report not later than June thirtieth, nineteen hundred and seventy-five and not later than June thirtieth of each year thereafter.

b. The report shall contain the following information:

1. List the name, address and type of practice of any professional organization in which the person reporting or his spouse, is an officer, director, partner, proprietor or employee, or serves in any advisory capacity, from which income of one thousand dollars or more was derived during the preceding calendar year.

2. List the source of each of the following items received or accrued during the preceding calendar year by the person reporting or his spouse.

(a) any income for services rendered, other than any source of income otherwise disclosed pursuant to paragraph one, of one thousand dollars or more;

(b) any capital gain from a single source of one thousand dollars or more other than from the sale of a residence occupied by the person reporting;

(c) reimbursement for expenditures of one thousand dollars or more in each instance;

(d) honoraria from a single source in the aggregate amount of five hundred dollars or more;

(e) any gift in the aggregate amount or value of five hundred dollars or more from any single source received during the preceding year, except as otherwise provided under the election law covering campaign contributions.

3. List each creditor to whom the person reporting or his spouse was indebted for a period of ninety consecutive days or more during the preceding calendar year in an amount of five thousand dollars or more.

4. List the identity of each investment and each

parcel of real property in which a value of twenty thousand dollars or more was held by the person reporting or his spouse at any time during the preceding calendar year, based on the cost thereof or when acquired by means other than purchase, an estimate of the value at the time of receipt.

5. List the identity of each trust or other fiduciary relation in which the person reporting or his spouse held a beneficial interest having a value of twenty thousand dollars or more during the preceding calendar year.

6. (a) Indicate if the total amount of income received from each and every source listed (1) pursuant to the provisions of paragraph one and subparagraphs a, b and c of paragraph two of this section is at least one thousand dollars but less than five thousand dollars; at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more; and (2) pursuant to the provisions of subparagraphs d and e of paragraph two of this section is less than one thousand dollars; at least one thousand dollars but less than five thousand dollars; at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more.

(b) Indicate if the total amount of indebtedness owed each creditor listed pursuant to paragraph three of this section was at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or over five hundred thousand dollars.

(c) Indicate if the total value of each investment and real property interest identified pursuant to paragraph four of this section and each beneficial interest identified pursuant to paragraph five of this section was, during the reporting period, at least twenty thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or five hundred thousand dollars or more:

c. Information filed pursuant to the provisions of this section shall be maintained by the city clerk and shall be made available to taxpayers pursuant to sections eleven thirteen and eleven fourteen of the city charter.

d. Any intentional violation of the provisions of this section shall constitute a misdemeanor punishable by imprisonment for not more than one year or by a fine not to exceed one thousand dollars or by both.

e. If any provision of this section shall be held invalid or ineffective in whole or in part or inapplicable to any person or situation, it is the purpose and intent of this section that all other provisions hereof shall nevertheless be separately and fully effective and that the application of any such provision to other persons or situations shall not be affected. (Added by L. L. 1975, No. 1, January 8.)"

APPENDIX "C"
STATUTORY PROVISION OF LOCAL LAW 48

2. New York City Local Law 48 of 1979:

"Section 1. Paragraphs one and three of subdivision a of section 1106-5.0 of chapter forty-nine of the administrative code of the city of New York are hereby amended to read, respectively as follows:

1. Each elected officer described in sections four, twenty-three, twenty-four, eighty-one and ninety-one of the New York city charter shall file such report not later than September first nineteen hundred seventy-nine and thereafter not later than July first of each year except, in the year in which such elected officer is a candidate for re-election or a candidate for one of the other offices hereinabove set forth, then and in that event such elected officer, as a candidate, shall file on or before the last day for filing his designating petitions pursuant to the election law.

3. Each agency head, deputy agency head, assistant agency head member of any board or commission, other than a member of a board or a commission who serves without conpensation and each city employee who is a member of the management pay plan or whose salary is thirty thousand dollars a year or more shall file such report not later than September first nineteen hundred seventy-nine and not later than July first of each year thereafter.

§2. Subdivision c of such sector of such chapter and code is hereby amended to read as follows:

c. Information filed pursuant to the provisions of this section shall be maintained by the city clerk and shall be made available for public inspections subject

to the provisions of subdivisions d, e and f of this section.

§3. Subdivisions d and e of such section of such chapter and code are hereby relettered to be g and h, respectively, and three new subdivisions, to be subdivisions d, e and f, are hereby added to read as follows:

d. 1. Any person required to file a report pursuant to this section may, at the time the report is filed or at any time thereafter, except when a request for inspection is pending, submit a request to the board of ethics, in such form as the board shall require, to withhold any item disclosed therein from public inspection on the ground that the inspection of such item by the public would constitute an unwarranted invasion of his or her privacy. Such request shall be in writing and shall be in such form as the board of ethics shall prescribe and shall set forth the reason such person believes the item should not be disclosed. The city clerk, upon receiving a written request by a member of the public, on such form as the board of ethics shall prescribe, to examine an item for which a written request to withhold information on the ground of privacy was submitted pursuant to this paragraph shall refer such request to the board of ethics and notify the person who filed the report that a request for inspection has been made. Whenever a request is made by a member of the public to examine a report, whether or not a request for privacy protection has been made, the city clerk shall so notify the person who filed the report.

2. The board of ethics shall evaluate such claim and any such item shall be withheld from public inspection upon a finding by the board that the inspection of such item by the public would constitute an unwarranted invasion of privacy. In making this determination, the board shall consider the following factors:

(a) whether the item is of a highly personal nature;

(b) whether the item in any way relates to the duties of the positions held by such person;

(c) whether the item involves an actual or potential conflict of interest.

3. The board of ethics shall establish procedures for the consideration of requests for withholding information on the ground of privacy. Such procedures shall include provisions for the person who filed the information to appear in person to set forth, or submit a written statement setting forth, the reasons why the information should be withheld from public inspection.

4. The determination of the board of ethics shall be in writing and shall set forth the reasons for such determination. The board shall forward its determination to the city clerk. Except for those items, if any, that the board of ethics finds would constitute an unwarranted invasion of privacy if disclosed, the city clerk shall make available to the person making such request the information requested.

e. Reports filed pursuant to this section shall be retained by the city clerk for a period of two years following the termination of the public employment of the person who filed the report. In the case of candidates for office who have filed reports pursuant to this section and who were not elected, the reports shall be retained by the city clerk for a period of two years following the day of an election on which the candidates were defeated. Such reports shall thereafter be destroyed by the city clerk unless a request for public disclosure of an item continued in such report is pending. In lieu of the destruction of such reports, the city clerk, in his discretion, may establish procedures providing for their return to the persons who filed them.

f. For the purposes of this section, the board of ethics shall mean the public members of the board of ethics appointed pursuant to section twenty-six hundred of the charter. Neither the corporation counsel nor the director of personnel shall participate in any determination made pursuant to this section.

§4. All reports filed pursuant to local law number one for the year nineteen hundred seventy-five which were filed with the city clerk prior to the effective date of this local law shall be destroyed by the city clerk.

§5. This local law shall take effect immediately."

APPENDIX "D"
OPINION OF DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

James SLEVIN, Mary Slevin, Brian Clinton, Joan Clinton, Dr. Stanley C. Fell, and Frank D'Amico, on their own behalf and on behalf of all others similarly situated,

v.

CITY OF NEW YORK; New York City Board of Ethics; Edward I. Koch, as Mayor of the City of New York; and David N. Dinkins as City Clerk, Defendants.

John J. BARRY, Marguerite V. Barry and James Grebhardt, on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

CITY OF NEW YORK; New York City Board of Ethics; Edward I. Koch, as Mayor of the City of New York; and David N. Dinkins, as City Clerk, Defendants.

Nos. 79 Civ. 4524 (ADS), 79 Civ. 4627 (ADS).
United St[illegible]es District Court,
S.D. New York.
Nov. 24, 1982.
As Amended Dec. 15, 1982

Class actions were brought presenting challenge to financial disclosure law enacted by New York City council and approved by mayor. The District Court,

Sofaer, J., held that: (1) financial disclosure law was invalid insofar as it permitted city clerk or any other government employee to make available for public inspection information filed pursuant to law by uniformed members of New York City fire and police departments who earned over $30,000 per year and their spouses, and (2) financial disclosure law was valid insofar as it required disclosure to city government of financial data.

Ordered accordingly.

1. Constitutional Law Key 82(7)

Right of privacy, as protected by common law and Constitution, relates to private revelations or direct public regulation of intimate activity, rather than to disclosures by government of information obtained and published for some public purpose. U.S.C.A. Const. Amends. 1, 4.

2. Municipal Corporations Key 218(1)

City is constitutionally free to abuse its employees and their families so long as in doing so it is seeking to achieve proper objective through defensible means.

3. Searches and Seizures Key 7(1)

Fourth Amendment applies to orderly taking under compulsion of process. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures Key 7(10)

Financial disclosure law enacted by New York City council and approved by mayor did not infringe upon public employees' Fourth Amendment right to be free of unreasonable searches and seizures where all of information sought by disclosure law was available through confidential, in-house inquiries, and thus, public employees lacked requisite expectation of privacy, and even if there was a reasonable expectation of privacy, filing regulations satisfied Fourth Amendment as they left no room for discretionary abuse by enforcement officers and therefore required no warrant to curb narrowly focused intrusions into privacy rights of those regulated. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures Key 7(1)

The Fourth Amendment demands only reasonableness, i.e., that information sought be particularly described and relevant to inquiry investigating agency is authorized to make, and that legislative judgment have reasonable basis. U.S.C.A. Const. Amend. 4.

6. Criminal Law Key 393(1)

When information individual is asked to provide is testimony which might tend to show that he had committed crime, filer is entitled to assert his or her privilege against self-incrimination. U.S.C.A. Const. Amend. 5.

7. Criminal Law Key 393(1)

Self-incrimination clause of Fifth Amendment is not general protector of privacy; it protects against compelled self-incrimination, not disclosure of private information. U.S.C.A. Const. Amend. 5.

8. Criminal Law Key 393(1)

Fifth Amendment privilege against self-incrimination does not justify refusal to file income tax return simply because certain disclosures might tend to incriminate. U.S.C.A. Const. Amend. 5.

9. Criminal Law Key 393(1)

Financial disclosure law enacted by New York City council and approved by mayor did not violate public employees' Fifth Amendment protection against compelled testimony that may be self-incriminating where only small portion of class members challenging law were engaged in criminal activity, law did not improperly coerce public employees to waive their privilege and failure to inform filers of availability of privilege was not a constitutional violation since ordinance was not part of focused investigation. U.S.C.A. Const. Amend. 5.

10. Constitutional Law Key 90.1(1), 91

Financial disclosure law enacted by New York City council and approved by mayor did not violate public employees' First Amendment rights of speech and association where law was not adopted for purpose of requiring disclosure of organizational membership, filing requirements did not seek to expose First

Amendment activities for sake of exposure or specifically for purpose of revealing political associations, and public employees challenging law failed to demonstrate that economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility would befall them. U.S.C.A. Const. Amend. 1.

11. Constitutional Law Key 82(7)

Actions affecting confidentiality strand of privacy are subject to judicial scrutiny more exacting than "rational basis" review, though precise standard of review remains subject of dispute. U.S.C.A. Const. Amend. 14.

12. Constitutional Law Key 82(11)

Financial disclosure law enacted by New York City council and approved by mayor did not violate Fourteenth Amendment right to privacy where filing requirement, accompanied by access limited to government investigators, would not substantially alter status quo and therefore would not offend substantial interest in confidentiality, filing requirement, coupled with access to forms, would not have significant impact on recognized autonomy interests, and inclusion of spousal finances in filing requirements was justified despite desire of some spouses to keep their finances secret from filing employee as failure to record disclosure of spousal finance, would render law meaningless because filer who wished to evade financial reporting requirements of law could easily funnel money and property to spouse. U.S.C.A. Const. Amend. 14.

13. Municipal Corporations Key 111(2)

Financial disclosure law enacted by New York City council and approved by mayor was invalid insofar as it permitted city clerk or any other government employee to make available for public inspection information filed pursuant to law by uniformed members of New York City fire and police departments who earned over $30,000 per year and their spouses where threat of public disclosure of specific areas of individual's life that involved highly personal matters seemed especially grave invasion of privacy and further limited utility and significance of privacy mechanism, and public disclosure would not provide a means to control corruption and conflicts of interest.

14. Municipal Corporations Key 111(4)

Invalid part of financial disclosure law enacted by New York City council and approved by mayor could be severed from valid portion as upholding valid provisions would not harm any interests city council sought to advance by law.

Gordon & Shechtman, P.C., New York City, for Slevin plaintiffs; Murray A. Gordon and Richard M. Betheil, New York City, of counsel.

Schofield & Dienst, New York City, for Barry plaintiffs; John P. Schofield, New York City, of counsel.

Frederick A.O. Schwartz, Jr., Corp. Counsel, New York City, for defendants; Deborah Rothman and Denise Thomas, New York City, of counsel.

New York Civil Liberties Union, New York City, amicus curiae; Arthur Eisenberg, New York City, of counsel.

OPINION AND ORDER

SOFAER, District Judge:

These class actions present a challenge to one of the scores of financial disclosure laws adopted by legislatures at all levels of American government since the political scandals of the Nixon Administration. Plaintiffs represent uniformed members of the New York City Fire and Police Departments who earn over $30,000 per year, and their spouses. They challenge the constitutionality of Local Law 48 of 1979, N.Y.C. Admin. Code §1106-5.0 (hereinafter "LL 48"), a financial disclosure law enacted by the New York City Council and approved by the Mayor. Plaintiffs claim that LL 48, as it applies to them, violates their constitutional rights under the first, fourth, fifth, ninth, and fourteenth amendments to the United States Constitution.

Financial disclosure laws were recognized long before the "Watergate" scandal as a potentially useful device for discovering and deterring conflicts of interest. Post-Watergate developments, however, have dramatically expanded the number, scope, and impact of disclosure laws. Few jurisdictions had adopted disclosure laws prior to 1970; those that existed in general applied to officials holding policymaking positions, and required disclosure, limited to the government involved or to other interested persons, of financial facts relevant to the work of the reporting officer. Since then, hundreds of such laws have been

adopted at all levels of government; they frequently apply to large groups of employees, including civil service personnel having little or no important policymaking power and they require disclosure to all members of the public, irrespective of any need to know or purpose in knowing, of all the financial facts concerning the reporting employee or official as well as those concerning all members of the reporting person's family.[1]

The significance of these developments has been heightened by the large number of Americans now employed by government. Furthermore, since many financial disclosure laws affect not only the privacy of government employees but also the privacy of their spouses and other household members, the number of affected individuals is far greater than the number of employees actually covered. Financial disclosure laws thereby potentially invade the privacy of millions of Americans as individuals and in their marital and family relations.[2]

Legislatively mandated financial disclosure laws do not normally violate the first, fourth, or fifth amendments to the Constitution. If any constitutional principle provides protection against disclosure of private, financial information it is the concept of privacy. Justice Harlan, in his illuminating dissent in *Poe v. Ullman*, 367 U.S. 497, 540, 81 S.Ct. 1752, 1775, 6 L.Ed.2d 989 (1961), recognized that the Constitution is "the basic charter of our society, setting out in spare but meaningful terms the principles of government." The Constitution must protect "legitimate expectations of privacy," he wrote, not only against physical or electronic invasions but against "all unreasonable intrusion of whatever character." *Id.* at 550, 81 S.Ct. at 1780. See also *Olmstead v. United*

States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). More recently, the Supreme Court has indicated that the interest in avoiding disclosure of personal information is constitutionally protected. *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Yet, while virtually every court that has considered financial disclosure laws has stated that the Constitution shields individual and family privacy as to financial matters, few courts have placed constitutional limits of any sort on legislatures requiring financial disclosures and providing that they be available to the public.[3]

[1] Powerful reasons explain why courts have properly been restrained in reviewing disclosure laws on privacy grounds. The right of privacy, as protected by common law and the Constitution, relates to private revelations or direct public regulation of intimate activity, rather than to disclosures by government of information obtained and published for some public purpose.[4] Financial disclosure laws are analogous to long accepted, lawful techniques for obtaining information reasonably necessary for governmental objectives. Furthermore, the objectives sought by financial disclosure laws are in principle unassailable and theoretically justify a broad scope of inquiry. Honest government is so patently a worthy objective, and the capacity for venality in human behavior is so profound and ingenious, that virtually any disclosure law however intrusive might be rationally justifiable. Financial disclosure laws also derive considerable strength from the benefits widely felt to be derived from openness and from an informed public. Justice Brandeis, an eloquent advocate of privacy, said:

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, *Other People's Money and How the Bankers Use It* 62 (1914), *quoted in Plante v. Gonzalez*, 575 F.2d 1119, 1127 n. 13 (5th Cir. 1978). The interest in an informed citizenry also supports a legislature's decision to adopt financial disclosure legislation. An informed public is essential to the nation's success, and a fundamental objective of the first amendment. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710 720, 11 L.Ed.2d 686 (1964).

The absence of any clear constitutional provision expressly protecting privacy no doubt adds to the judiciary's reluctance to fashion limits on laws justified as seeking to make government more ethical. None of the more specific and relatively well-defined provisions of the Bill of Rights applies to financial disclosure legislation. Courts are therefore left to consider possible limits based only upon the general right of privacy, an interest that permeates our constitutional scheme but finds no specific expression. While some former Justices of the Supreme Court could peer into the constitutional penumbra and discern with confidence the contours of the privacy right, less visionary readings now prevail. The sweeping claims generally advanced by plaintiffs challenging such laws have made judicial involvement even less tenable than the interests at stake might warrant. Courts have rarely if ever been provided the evidence in specific cases that might establish the propriety of limited protections against the overbroad use of an otherwise proper legislative device.

To the extent plaintiffs in these cases have presented a facial attack on LL 48, their challenge must fail. The Supreme Court's affirmances without opinion of three decisions upholding disclosure laws leave no room for an attack on LL 48's constitutionally as a whole. But plaintiffs in this case insisted, refreshingly, that the Court consider their particular claims, and not merely pass on the law as an abstract exercise. They produced comprehensive evidence of the law's purposes, its legislative background, its scope, its expected effects, and its potential utility. They also proved facts about themselves as municipal servants and human beings, the jobs they do, their record of performance, their fears and feelings.

[2] Plaintiffs introduced strong evidence to support their claims that they should be relieved entirely of the burdens and intrusions created by LL 48. One could reasonably conclude from their evidence that LL 48 is a thoughtless and unwise intrusion by the City into the lives of many of its most valued employees. But the City is constitutionally free to abuse its employees and their families, so long as in doing so it is seeking to achieve a proper objective through a defensible means. Furthermore, with respect to the law's obligation that plaintiffs file the forms required by LL 48, plaintiffs lack any strong expectation of privacy, since such information is already available to the Fire and Police Departments, and the City was able to establish that disclosures of the information to City government might help deter and detect conflicts of interest and venality.

Plaintiffs did succeed, however, in establishing that on the present record the public disclosure aspect of the challenged law would interfere substantially

with their privacy interests in autonomy and confidentiality. The law contains a mechanism that would enable covered employees to seek to have highly personal matters kept from public view. But that mechanism would itself be greatly destructive of privacy. Plaintiffs also proved that the public disclosure component of LL 48 serves no defensible purpose with respect to plaintiffs in this case. Public disclosure serves the useful purposes of deterring and detecting corruption, of enabling the public to perform its legislative and elective roles, and of increasing public confidence in and knowledge about government by enabling the public to evaluate all the facts relevant to public issues, including the financial facts about government policymakers. But these purposes lacked any evidentiary support or rational basis in this particular case. Plaintiffs are not elected, and they lack policymaking roles; rather, they are civil servants who achieved the lower managerial ranks of their agencies through success on competitive exams, after many years of service. The law's purpose as to these plaintiffs appears to be disclosure for disclosure's sake.

On the basis of the findings and conclusions that follow in this opinion, therefore, the City's financial disclosure law is upheld insofar as it requires disclosure to the City government of the family financial data sought from the plaintiff groups. The law is invalid, however, insofar as it mandates disclosure of all the information collected from the plaintiff groups, to any person irrespective of purpose or need.

I

LL 48 requires, on pain of criminal penalty,[5] that all covered individuals file annual financial statements with the City. The ordinance covers candidates for City office, most elected and appointed officials, and all civil service employees of the City who earn $30,000 per year or more.[6] LL 48 requires that these people disclose the following information:

> "the name, address and type of practice of any professional organization in which the person reporting or his spouse" has any interest "from which income of one thousand dollars or more was derived during the preceding calendar year," §1106-5.0b, subd. 1;
>
> the source of items "received or accrued during the preceding calendar year" by the employee or his or her spouse constituting income for services rendered of $1,000 or more, §1106-5.0b, subd. 2; each capital gain of $1,000 or more from a single source, other than from the sale of the reporting person's resicence, *id.;* reinbursement for expenditures of $1,000 or more "in each instance," and honoraria or gifts from a single source aggregating $500 or more, *id.;*
>
> each creditor to whom the employee or spouse owed $500 or more for 90 days or more during the preceding year, §1106-5.0b, subd. 3;
>
> the value and address of each investment or parcel of real property worth $20,000 or more held by the person reporting or spouse, §1106-5.0b, subd. 4;
>
> and each trust or other fiduciary relation in which the employee or spouse held a beneficial interest having a value of $20,000 or more, §1106-5.0b, subd. 5.

The identity, source, and amount of each of the foregoing must be reported in detail. §§1106-5.0b, subd. 1-6.

The completed forms are filed with the City Clerk, who must automatically make them available to any member of the public, §1106-5.0c, unless the employee has requested the City's Board of Ethics in writing that a specific item be withheld because public disclosure of it would constitute an unwarranted invasion of privacy, §1106.5d.

No action is taken on privacy claims until a request for inspection of a particular form is filed by a member of the public. When a request for inspection is made, the law requires that the public members of the Board of Ethics rule on all privacy claims after considering three factors: whether the item is of "a highly personal nature"; whether it "in any way relates to the duties of the position held by such person"; and whether it "involves an actual or potential conflict of interest." §1106-5d, subd. 2. The Board must render a written decision and forward it to the City Clerk. The Clerk may then make the form requested available for disclosure, except those items exempted from disclosure by a decision of the Board. §1106-5d, subd. 4.

LL 48 is a modified version of a disclosure law passed by the City Council in 1975, Local Law 1 of 1975 ("LL 1"). The New York courts declared the public disclosure provisions of LL1 invalid because the law did not safeguard privacy interests. *Hunter v. City of New York*, 58 A.D.2d 136, 396 N.Y.S.2d 186 (1st Dep't 1977), *aff'd*, 44 N.Y.2d 708, 405 N.Y.S.2d 455, 376 N.E.2d 928 (1978). LL 48 differs from LL 1 principally in that the Council added the "privacy mechanism" just described.

After passage of LL 48 in 1979, certain members

of the New York City Fire Department and their spouses filed one of the instant actions to enjoin its application to them. *Slevin v. City of New York*, No. 79 Civ. 4524 (S.D.N.Y.). The plaintiff classes in *Slevin* include Fire Department Battalion Chiefs, Deputy Chiefs, Medical Officers, and the spouses of these three officer classes. The officers involved are all uniformed city employees, occupying competitive civil service positions, who are required to file financial disclosure reports because they earn over $30,000 annually. This Court preliminarily enjoined application of LL 48 to these plaintiffs on September 6, 1979. *Slevin v. City of New York*, 477 F. Supp. 1051 (S.D.N.Y. 1979). Just prior to issuance of that preliminary injunction, certain members of the New York City Police Department and their spouses filed the companion action, *Barry v. City of New York*, No. 79 Civ. 4627 (S.D.N.Y.), challenging LL 48 as applied to them. The *Barry* plaintiffs also represent four groups: Captains, Lieutenants, Police Surgeons, and their spouses. All the officers represented are uniformed city employees, occupying competitive civil service positions, who earn in excess of $30,000 annually. On September 10, 1979, the preliminary injunction issued in *Slevin* was expanded to include the *Barry* plaintiffs. The matters were consolidated, and tried on the merits, after which the parties briefed the issues prior to submitting the case for judgment.

II

Defendants urge the outright rejection of plaintiffs' claims, because the Supreme Court has dismissed for lack of a substantial federal question three appeals from decisions by state supreme courts upholding financial disclosure laws. *Montgomery*

County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), *app. dismissed*, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (en banc), *app. dismissed*, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974); *Stein v. Howlett*, 52 Ill.2d 570, 289 N.E.2d 409 (1972), *app. dismissed*, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973). These dismissals are dispositions on the merits, binding on "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam); *see Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975); *Port Authority Bondholders Protective Comm. v. Port of New York Authority*, 387 F.2d 259, 262 n. 3 (2d Cir. 1967). They do indeed foreclose several of plaintiffs' claims, epecially in conjunction with other Supreme Court decisions. But they cannot fairly be said to preclude all of plaintiffs' challenges. Here, as in *Plante v. Gonzalez*, 575 F.2d 1119, 1125 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S. Ct. 1047, 59 L.Ed.2d 90 (1979), the statute at issue differs from each of the statutes upheld in those cases, and the nature of the challenge made in this case differs in important respects from the challenges to those statutes.

All three dismissals involved facial challenges to the disclosure laws at issue; here, plaintiffs challenge LL 48 as it applies to them. Furthermore, none of the dismissed cases focused on the constitutionality of requiring public disclosure by employees with little or no policymaking authority. In *Fritz v. Gorton*, *supra*, only disclosure by elected officials, candidates for elective office, and lobbyists was at issue. The ordinance challenged in *Montgomery County v. Walsh*, *supra*, unlike LL 48, provided for disclosure by employees on-

ly "where it is determined by designated authority that it is 'desirable to promote the trust and confidence of the citizens of the County,' " and exempted from the filing requirements persons whose job responsibilities posed little likelihood of conflict of interest or corruption. 336 A.2d at 102. The Illinois Supreme Court's opinion in *Stein v. Howlett, supra,* was based entirely upon state law, and, as in *Fritz* and *Montgomery County,* the appeal to the United States Supreme Court was dismissed in 1973, before the Supreme Court's decisions in *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) and *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), which both recognized a constitutional "interest in avoiding disclosure of personal matters." *Whalen v. Roe,* 429 U.S. at 599, 97 S.Ct. at 876.

The plaintiff classes in this case have demonstrated that public disclosure of their finances will substantially and adversely affect recognized privacy interests, while serving no substantial public purpose. The Supreme Court has not considered the public disclosure aspects of disclosure laws on a full evidentiary record, revealing both the effects of and need for disclosure to the government and to the public of private information obtained from particular groups of employees. Consequently, although the dismissals for lack of a substantial federal question may "caution . . . against finding [LL 48] unconstitutional," *Plante v. Gonzalez, supra,* 575 F.2d at 1126, this Court must "undertake an independent examination of the merits," *Mandel v. Bradley, supra,* 432 U.S. at 177, 97 S.Ct. at 2241.

III

Plaintiffs argue that LL 48 infringes their fourth amendment right to be free of unreasonable searches and seizures, their fifth amendment right against compelled self-incrimination, their first amendment rights of free speech and association, and their fourteenth (or ninth) amendment right to privacy, that is, their right not to be deprived of the liberty interest in privacy without due process of law. Only the privacy claim has merit, and only to the extent delineated below.

A. *The Fourth Amendment*

[3] The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . . " U.S. Const. amend. IV. "[T]he evil the amendment was designed to prevent was broader than the abuse of a general warrant," *Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379, 63 L.Ed.2d 639 (1980), though the amendment has not been "translated into a general constitutional 'right to privacy.' " *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967). The fourth amendment seems applicable to governmental acquisition of information whatever means are chosen, see generally *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 59-63, 94 S.Ct. 1494, 1516-18, 39 L.Ed.2d 812 (1974) (discussing relevance of fourth amendment to reporting income as required by federal tax statutes); certainly it applies "to the orderly taking under compulsion of process," *United States v. Morton Salt Co.*, 338 U.S. 632, 651, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950). "[T]he Fourth Amendment protects people,

not places . . . and whenever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968) (citations omitted).

[4] Plaintiffs have not argued that the fourth amendment limits the uses to which information legitimately "seized" may be put. Therefore, plaintiffs do not contend that the amendment is directly relevant to the provisions permitting public access to the forms. *See Slevin* Plaintiff's Post-Trial Memorandum at 72-74. Insofar as the City has required filing, however, plaintiffs argument fails because they lack the requisite expectation of privacy. *See Whalen v. Roe, supra*, 429 U.S. at 602, 97 S.Ct. at 877. An employee in the upper echelons of the Fire or Police Department, or his or her spouse, cannot reasonably expect to keep his financial dealings and holdings, or his address, or any other information required by LL 48, secret from his employer. Plaintiffs established at trial that all of the information sought by LL 48 is available to the Fire and Police Departments through confidential, in-house inquiries. Transcript of Trial (Nov. 6, 7, 12, 13, 1980) at 524-25 [hereinafter "T."]; Transcript of Trial (Dec. 3, 1980) at 60-68 [hereinafter "T.D."].

[5] If plaintiffs had a reasonable expectation of privacy, the filing regulations would nevertheless satisfy the fourth amendment. In this context the amendment demands only reasonableness, *i.e.*, that the information sought be "particularly described" and relevant to an inquiry the investigating agency is authorized to make, and that the legislative judgment have a reasonable basis. *California Bankers Ass'n v.*

Shultz, supra, 416 U.S. at 62-63, 94 S.Ct. at 1518; *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1946); *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed. 2d 223 (1977). The uniform application of the filing regulations leaves no room for discretionary abuse by enforcement officers and therefore requires no warrant to curb narrowly focused intrusions into the privacy rights of those regulated. *See Camara v. Municipal Court, supra*, 387 U.S. at 530-32, 87 S.Ct. at 1732; *See v. City of Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967); *cf. Nixon v. Administrator of General Services*, 433 U.S. 425, 464 n. 26, 97 SCt. 2777, 2801 n. 26, 53 L.Ed. 867 (1977). The information sought by the forms is uniform, described in detail, and relevant in general to the proper governmental objectives of investigating and deterring conflicts of interest. While the scope of inquiry mandated by LL 48 is broad, it cannot be equated with a general warrant, since each type of information sought has logical relevance to valid government objectives.

B. *The Fifth Amendment*

[6] Plaintiffs also assert that LL 48 "implicates the Fifth Amendment protection against compelled testimony that may be self-incriminating." *Slevin* Plaintiff's Post-Trial Memorandum at 74-75. Methods employed by the state in requiring disclosures must be "consistent with the limitations created by the privilege." *Marchetti v. United States*, 390 U.S. 39,

44, 88 S.Ct. 697, 700, 19 L.Ed.2d 889 (1968). LL 48 affixes a criminal penalty to failure to respond to the questionnaire, so it exerts real compulsion upon covered employees. *See Counselman v. Hitchcock,* 142 U.S. 547, 562, 12 S.Ct. 195, 197, 35 L.Ed. 1110 (1892). Further, LL 48 elicits "testimony" rather than requiring production of pre-made financial records. *See Fisher v. United States,* 425 U.S. 391, 408, 96 S.Ct. 1569, 1579, 48 L.Ed.2d 39 (1976). Where the information an individual is asked to provide is "testimony which might tend to show that [he] had committed a crime," *Counselman v. Hitchcock, supra,* 142 U.S. at 562, 12 S.Ct. at 197; *See Leffkowitz v. Turley,* 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L.Ed.2d 274 (1973), the filer is entitled to assert his or her privilege against self-incrimination.

[7-9] But the fact that the privilege might be available to individuals within the plaintiff classes does not invalidate the law. Like the fourth amendment, the self-incrimination clause of the fifth amendment is not "a general protector of privacy. . . . [T]he Fifth Amendment protects against 'compelled self-incrimination.' " *Fisher v. United States, supra,* 425 U.S. at 401, 96 S.Ct. at 1576 (quoting *United States v. Nobles,* 422 U.S. 225, 233 n. 7, 95 S.Ct. 2160, 2167 n. 7, 45 L.Ed.2d 141 (1975)). Thus, the privilege does not justify refusal to file an income tax return simply because certain disclosures might tend to incriminate. *United States v. Sullivan,* 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). This is not a case like *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), or *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), where the compulsory disclosure applied only to a group "the great

majority of whom [are] likely to incriminate themselves by responding." *Garner v. United States*, 424 U.S. 648, 660, 96 S.Ct. 1178, 1185, 47 L.Ed.2d 370 (1976). Plaintiffs exerted much effort at trial successfully establishing that only a small proportion of class members are engaged in criminal activity. True, the disclosure forms at issue are not directed to the public at large; but, as with tax returns, "[t]he great majority of persons" filing these forms will "not incriminate themselves" by filing. *Garner v. United States, supra*, 424 U.S. at 661, 96 S.Ct. at 1186.

Nor does LL 48 improperly coerce plaintiffs to waive the privilege. As with income tax statutes, if the form calls for answers that a particular filer is privileged from making he can raise the objection on the form. *United States v. Sullivan, supra*, 274 U.S. at 263, 47 S.Ct. at 607. A conviction under LL 48 for failure to respond "cannot be based on a valid exercise of the privilege." *Garner v. United States, supra*, 424 U.S. at 662, 96 S.Ct. at 1186. "As long as a valid and timely claim of privilege is available as a defense" for failure to file, the fifth amendment is not violated. *Id.* at 665, 96 S. Ct. at 1188. Moreover, plaintiffs could not be discharged from their jobs solely because they claimed the privilege on the form, because the form does not contain "questions specifically, directly, and narrowly relating to the performance of [their] official duties . . . " *Gardner v. Broderick*, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968) (footnote omitted). Neither the statute nor the questionnaire makes the prohibited suggestion that a failure to waive the privilege will result in dismissal. *See Garrity v. New Jersey*, 385 U.S. 493, 497-98, 87 S.Ct. 616, 618, 17 L.Ed.2d 562 (1967). Finally, the questionnaire's failure to inform filers of the

availability of the privilege is not a constitutional violation, since the ordinance is not part of a focused investigation. *See Escobedo v. Illinois,* 378 U.S. 478, 490-91, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977 (1964).[7]

C. *The First Amendment*

[10] Plaintiffs have failed to establish that LL 48 will significantly inhibit the exercise of their first amendment rights of speech and association. LL 48 was not adopted for the purpose of requiring disclosure of organizational membership. Statutes that require such disclosures have been held to violate the first amendment where they were found to have been intended to restrain the freedom of association. *See, e.g., Louisiana ex rel. Gremillion v. NAACP,* 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301 (1961); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449, 78 S. Ct. 1163, 2 L.Ed.2d 1488 (1958). Here, as Judge Wisdom noted in *Plante v Gonzalez, supra,* 575 F.2d at 1132, "memberships, associations, and beliefs are revealed, if at all, only tangentially." The law requires disclosure of certain assets, income, debts, gifts, and reimbursements, and therefore neither focuses on some political or religious financial relationships as opposed to others, nor discriminates among those political or religious affiliations that might be revealed. Moreover, the filing requirements do not seek "to expose" first amendment activities "for the sake of exposure," *Watkins v. United States,* 354 U.S. 178, 200 77 S.Ct. 1173, 1185, 1 L.Ed.2d 1273 (1957), or specifically for the purpose of revealing political associations, *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 558, 83 S.Ct. 889, 899, 9 L.Ed.2d 929 (1963), but rather for the sake of

revealing potential financial conflicts of interest or financial indices of corruption, whatever their source.

To establish a first amendment violation in these circumstances, plaintiffs must show that the law would unreasonably inhibit the exercise of their first amendment rights. They failed to demonstrate that "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," *Buckley v. Valeo*, 424 U.S. 1, 69-70, 96 S.Ct. 612, 658, 46 L.Ed.2d 659 (1976) (per curiam), would befall them because of the revelations of protected activity in the form, or that in even a single instance protected activity would be foreclosed.[8] Conceivably, "in some particular situations," where for example a real threat of retaliation would attend a specific disclosure, "vigorous application of [LL 48] might implicate first amendment freedoms"; but on this record "this threat is too remote to raise the issue." *Plante v. Gonzalez, supra*, 575 F.2d at 1132-33; *cf. Buckley v. Valeo, supra*, 424 U.S. at 70, 74, 96 S.Ct. at 659, 661.

IV

Plaintiffs' strongest argument for protection is under the fourteenth amendment's guarantee of the substantive liberty interest in privacy.[9] The right to privacy is still undefined. *Whalen v. Roe*, 429 U.S. 589, 598-99 & nn. 23, 24, 97 S.Ct. 869, 876 & nn, 23, 24, 51 L.Ed.2d 64 (1977). *See generally*, Fried, *Privacy*, 77 Yale L.J. 475 (1968); Gerety, *Redefining Privacy*, 12 Harv. C.R.—C.L. L. Rev. 234 (1977); Kurland, *The Private I*, University of Chicago Magazine 7, 8 (autumn 1976); Parker, *A Definition of Privacy*, 27 Rutgers L.Rev. 275 (1974); Posner, *The Right of*

Privacy, 12 Ga.L.Rev. 393 (1978). But it clearly protects "two different kinds of interests. . . . One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe, supra*, 429 U.S. at 598-600, 97 S.Ct. at 875-877. Those two interests have been labeled interests in "confidentiality" and "autonomy." *Plante v. Gonzalez, supra*, 575 F.2d at 1128.

The autonomy branch of privacy, the more developed of the two, creates a zone of freedom from government restrictions on personal choice in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). Cases involving government regulation of these matters establish that such laws must satisfy esacting judicial scrutiny. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383, 98 S.Ct. 673, 679, 54 L.Ed.2d 618 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 155-56, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973).

In *Plante v. Gonzalez*, the Fifth Circuit held that "[f]inancial privacy is not within the autonomy branch of the right to privacy." 575 F.2d at 1132; *accord O'Brien v. DiGrazia*, 544 F.2d 543, 545 (1st Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Financial regulation is widespread in this society, and its direct effects make the "indirect effects caused by financial disclosure pale by comparison." 575 F.2d at 1131. While noting the Supreme

Court's recognition in *Buckley v. Valeo*, 424 U.S. 1, 66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976), that financial transactions can reveal much about a person's activities, associations, and beliefs, the Fifth Circuit in *Plante* found that personal finances cannot "be protected as incident to protection of the family.... There is no doubt that financial disclosure may affect a family, but the same can be said of any government action.... [A]ny influence does not rise to the level of a constitutional problem." 575 F.2d at 1131.

The analysis in *Plante* of the autonomy branch as it relates to financial disclosure is unassailable to the extent that it finds no "presumptive immunity from regulation" for financial affairs. Henkin, *Privacy and Autonomy*, 74 Colum. L.Rev. 1410, 1411 (1974). The autonomy cases do not rest on what Professor Henkin calls "hard-core privacy," or what people commonly mean by privacy. Regulation of marital affairs, or what one chooses to read, or how one wants to raise one's children, is suspect because of the matters sought to be controlled, not because the regulations intrude into bedrooms, minds, or bodies. *Id.* at 1424-25. "Financial affairs" in general has never been regarded under our Constitution as an area of life that in itself is so fundamental to liberty that regulation is automatically deemed suspect. Such regulation is squarely within the police power, and as an abstract proposition is if anything presumptively valid.

Financial disclosure may nevertheless substantially, albeit indirectly, affect recognized autonomy interests. The characterization—"financial" privacy—should not be permitted, by verbal trick, to relegate substantial autonomy claims to the constitu-

tional status reserved for "economic problems, business affairs, or social conditions." See *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965). Financial privacy is not an "economic" as opposed to a "personal" right. Financial facts are sometimes protected under the Constitution for essentially the same reasons that homes are protected—not because finances are "property," but because protecting financial affairs is in some situations a necessary means for protecting the very "personal" right of privacy. *See Nixon v. Administrator of General Services, supra*, 433 U.S. at 529, 97 S.Ct. at 2833 (Burger, C.J., dissenting) (privacy of "purely private matters of family, property, investments, diaries" is interest of the highest order). Therefore, even though the adverse effects of government action on financial privacy are ordinarily insufficient to justify invoking a presumptive immunity, but *see* Comment, *Privacy Limits On Financial Disclosure Laws: Pruning Plante v. Gonzalez*, 54 N.Y.U.L.Rev. 601, 613-16 (1979), a court must still decide in each case what significance to give those effects. Autonomy and confidentiality interests are sometimes simultaneously affected, as in this case, and must be simultaneously considered, albeit by a less exacting standard than strict scrutiny. Neither should be disregarded because of a mechanical application of current, bifurcated privacy doctrine.

The right to privacy's confidentiality branch is "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe, supra*, 429 U.S. at 599, 97 S.Ct. at 876. Protection for legitimate expectations of privacy is premised on concern about harms caused by their violation. See *California Bankers Ass'n v.*

Shultz, supra, 416 U.S. at 78-79, 94 S.Ct. at 1525 (Powell, J., concurring); *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 270, 85 Cal. Rptr. 1, 9, 466 P.2d 225, 233 (1970). But, as Judge Wisdom said in *Plante v. Gonzalez, supra*, 575 F.2d at 1135, "[w]hen a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally. . . ."

The Supreme Court has on two occasions expressly considered the confidentiality branch of privacy. In *Whalen v. Roe, supra*, the Court upheld New York State's prescription drug reporting requirements. The Court did not establish a standard to be applied to the interest in avoiding public disclosure of personal matters, because it was persuaded that the law did not on its face pose "a sufficiently grievous threat to [the] interest to establish a constitutional violation." 429 U.S. at 600, 97 S.Ct. at 877. The statute did not make the disclosed personal information available to the public, but rather carefully limited access to authorized state employees under a strict duty to keep it confidential. *Id.* at 597, 97 S.Ct. at 875. Further, the law provided for destruction of the records after five years. *Id.* at 593, 97 S.Ct. at 873. In essence, the law did not affect a reasonable expectation of privacy, because limited disclosure of potentially embarrassing medical information is "often an essential part of modern medical practice." *Id.* at 602, 97 S.Ct. at 877. The disclosures mandated differed little "from a host of other unpleasant invasions of privacy that are associated with many facets of health care." *Id.; see is.* at 607, 97 S.Ct. at 880 (Brennan, J., concurring).

Any doubt about the constitutional standing of the interest in avoiding disclosure of personal matters remaining after *Whalen v. Roe, supra, see id.* at 608-9, 97 S.Ct. at 881 (Stewart, J., concurring) (arguing that prior cases do not recognize the right), was removed by *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). In *Nixon*, the former President challenged the Presidential Recordings and Materials Preservation Act, which provided for the disposition of great numbers of documents and tape recordings amassed during his presidency. Comingled among many official documents in which Mr. Nixon conceded he had no privacy interest were a comparatively small number of his private communications and his wife's private files. *Id.* at 459, 97 S.Ct. at 2798. The Act and implementing regulations provided that professional archivists would examine all the materials, remove and return to the plaintiff all private matters, and preserve the official documents for the government and the public. The Court determined that Mr. Nixon, unlike the *Whalen* plaintiffs, had "a legitimate expectation of privacy" in some of the materials, *id.* at 465, 97 S.Ct. at 2801, and instead of employing the "rational basis" standard, appropriate where no constitutionally protected right is at issue, the Court balanced the interests involved and upheld the law. The public interest in preserving the public documents was "important"; the screening was "essential" if the public documents were to be preserved and Mr. Nixon's privacy respected; the personal items would not be available to the public; and the government archivists' record for discretion was "unblemished." *Id.* at 455-65, 97 S.Ct. at 2796.

[11] *Whalen* and *Nixon* make reasonably clear that actions affecting the confidentiality strand of privacy are subject to judicial scrutiny more exacting than "rational basis" review, though the precise standard of review remains a subject of dispute. Some state courts have applied variants of the "strict scrutiny" test to such statutes. *E.g., City of Carmel-by-theSea v. Young, supra.* Plaintiffs, although labeling it a "balancing analysis," *Slevin* Plaintiffs' Post-Trial Memorandum at 82, argue for strict scrutiny, claiming that to be constitutional LL 48 must "promote a compelling state interest and be the means to accomplish that purpose that is least intrusive of the constitutionally-protected interest." *Id.* at 76. This approach seems inappropriate in reviewing statutes for breach-of-confidentiality claims. As Judge Wisdom stated for the Fifth Circuit:

> In equal protection cases the Supreme Court has warned against giving heightened attention to cases involving new "fundamental interests." The Court has avoided proclaiming such a standard in the two cases raising the [confidentiality branch of privacy] issue in which it issued opinions, *Whalen v. Roe* and *Nixon v. Administrator of General Services.* It has dismissed for want of a substantial federal question three cases raising the question in financial disclosure contexts. . . . Subjecting financial disclosure laws to the same scrutiny accorded laws impinging on autonomy rights, such as marriage, contraception, and abortion, would draw into question many common forms of regulations, involving disclosure to the public and disclosure to government bodies.
>
> At the same time, scrutiny is necessary. The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be

> demonstrated. Otherwise, public disclosure requirements . . . could be extended to anyone, in any situation.

Plante v. Gonzalez, supra, 575 F.2d at 1134 (citations omitted). But see *Whalen v. Roe, supra,* 429 U.S. at 606, 97 S.Ct. at 879 (Brennan, J., concurring) ("Broad dissemination by state officials of [personal] information . . . would presumably be justified only by compelling state interests.")

Virtually every court considering the question has, at least nominally, applied some form of intermediate scrutiny. *Nixon* appears to use a balancing approach, 433 U.S. at 456-57, 97 S.Ct. at 2796, as defendants concede most lower courts have done. Defendants' Post-Trial Memorandum at 50. *See, e.g., Stein v. Howlett, supra,* 289 N.E.2d at 413; *Illinois State Employees Ass'n v. Walker,* 57 Ill.2d 512, 315 N.E.2d 9, 15, *cert. denied,* 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656 (1974); *Montgomery County v. Walsh, supra; Hunter v. City of New York, supra.* In *Plante v. Gonzalez, supra,* and in *Duplantier v. United States,* 606 F.2d 654 (5th Cir. 1979), *cert. denied,* 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981) the Fifth Circuit found that challenges to financial disclosure laws require courts to apply a balancing test "to determine whether the legitimate governmental interests furthered . . . outweigh [the] incidental intrusion upon plaintiffs' privacy." *Duplantier v. United States,* 606 F.2d at 670. Both *Plante* and *Duplantier,* however, also suggested a similar but potentially more restrictive test requiring that such laws "substantially further important governmental interests." *Duplantier,* 606 F.2d at 672; *see Plante,* 575 F.2d at 1134. The propriety of such a test is supported

by its close relation to the approach adopted by the Supreme Court in so-called "middle tier" equal protection cases. *See Plyler v. Doe*, __U.S.__, __ & n. 16, 102 S.Ct. 2382, 2395 & n. 16, 72 L.Ed.2d 786 (1982) (education restrictions based on illegal alien status); *Lalli v. Lalli*, 439 U.S. 259, 275-76, 99 S.Ct. 518, 528, 58 L.Ed.2d 503 (1978) (classifications based on alienage); *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976) (classifications based on sex).

This case, however, does not turn on what precise intermediate standard of protection is applied to LL 48. To the extent LL 48 orders disclosure by the plaintiff groups to the City government, it would be upheld under the most stringent standard conceivable for such a financial disclosure statute; it easily satisfies the balancing approach suggested by *Nixon*, and applied in *Plante* and *Duplantier*. On the other hand, to the extent LL 48 provides for disclosure to the public of all information collected from the plaintiff groups, limited only by the statute's "privacy" mechanism, it fails to satisfy any standard of review other than on an improperly "toothless" application of "mere rationality." *See Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764, 49 L.Ed.2d 651 (1976).

A. *Disclosure to the City Government*

[12] LL 48 prescribes a two-step process. First, each individual covered by the law must file a disclosure form with the City Clerk. Second, the Clerk is to make the forms available to members of the public, subject only to the privacy mechanism. The evidence established that autonomy and confidentiality interests will be somewhat affected by the filing requirement, but that governmental interests in deterr-

ing and detecting conflicts of interest and venality will be furthered sufficiently to justify that requirement.

Plaintiffs concede that in-house procedures in both the Fire and Police Departments already provide the City access to all the financial information required of them by LL 48. T. 525; T.D. 68. This is not a case like *American Federation of Government Employees v. Schlesinger*, 443 F. Supp. 431 (D.D.C. 1978), where even though disclosures would not be made public they trenched on substantial first amendment interests. Nor does it resemble *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979), where mandatory in-house disclosure of a police officer's relationship with a paramour was held to intrude upon the zone of privacy secure even from a government employer. Rather, as in *Whalen v. Roe*, *supra*, 429 U.S. at 593, 97 S.Ct. at 873, and *O'Brien v. DiGrazia*, *supra*, 544 F.2d at 546, the filing requirement, accompanied by access limited to government investigators, would not substantially alter the status quo and therefore would not offend a substantial interest in confidentiality.

Nor will the filing requirement, coupled with government access to the forms, have a significant impact on recognized autonomy interests. Plaintiffs presented evidence that LL 48 will prevent them from making certain choices about how to structure their family life. Specifically, they established that some employee plaintiffs choose to keep their financial affairs secret from their spouses, their children, or members of their extended family. T. 272-82. Similarly, some spouses choose to keep their financial affairs secret from the spouse who would have to file. T.

280-83. Plaintiffs failed to establish, however, that filing or government access to the forms will in any way affect employee choice to keep financial information from family members. Children, other family members, and even spouses need not have access to the forms prior to filing, since only the employee must verify and sign the form. Family members could acquire the information only as a result of the public disclosure provisions.

Filing will necessarily compromise a spouse's desire to keep secret his or her finances from the filing employee, and no provision is made in the law for separate filing by the spouse. Indeed, the employee, as the filer, just attest to the accuracy of the information relating to the spouse's earnings, holdings, debts, and so forth. But this interest, though substantial in some families,[10] is insufficient to invalidate the filing requirement, either in its entirety or only insofar as it applies to spouses. Although one spouse testified that the requirement would "strain" her marriage, no evidence suggested that it would significantly affect the decisions whether to marry, whether and when to procreate, or other family decisions heretofore held protected by the autonomy branch.

Plaintiffs sought to prove at trial that the disclosure required by LL 48 would serve no useful purpose. Like LL 1 before it, LL 48 contains no declaration of policy. But, as the Appellate Division said in *Hunter v. City of New York, supra*, 58 A.D.2d at 137, 396 N.Y.S.2d at 187, "the object of this ordinance is clear: to discourage and detect corruption and the appearance of corruption, avoid conflicts of interest and instill in the public a sense of confidence in the integrity and impartiality of its public servants."

Plaintiffs sought to negate these as valid purposes by proving that no corruption has been shown to have occurred in living or recorded memory within the ranks of Fire Department plaintiffs and among Police Surgeons; furthermore, opportunities for corruption among these groups of plaintiffs are limited.[11] Some government witnesses asserted that opportunities existed for Deputy and Battalion Chiefs to engage in corruption or to have conflicts of interests, *see, e.g.*, T.D. 20-31, 45, particularly with respect to their supervision of inspections. Plaintiffs discredited much of this testimony, T.D. 50-56, 58, and presented credible testimony to the contrary, *see* T. 39-46, 54. Given Fire Inspector General Kotch's agreement that "[t]here is . . . no proof whatsoever of a single instance of active corruption or conflict of interest activity by a Chief Officer," T.D. 152, plaintiffs' evidence is far more credible. Corruption in the ranks of Police Captains and Lieutenants has often been demonstrated, and opportunities for corruption exist among these groups.[12] Plaintiffs proved, though, that corruption among such police officers is much less frequent than in the lower ranks; that procedures already in place in the Departments serve the deterrent and detection purposes of the law; and that internal procedures are more effective than employee disclosure, because they do not depend upon employee compliance and forms that may well be little used by investigators, *see* T. 589.

Investigators charged with policing the integrity of employees in both the Fire and Police Departments credibly testified, however, that governmental access to the information secured by LL 48 would be of some help to them in discharging their duties, and would serve to deter conflicts of interest. T.586, 632; T.D. 44,

99, 184-91. Corruption and more subtle conflicts of interest are possible in each group of plaintiff employees. That no corruption has been proved among several groups of plaintiffs does not establish that improprieties have never occurred, or would never be deterred or uncovered by the filings. Inspector General Kotch expressed the view that ample opportunities for corruption exist among Batallion and Deputy Chiefs. T.D. 20-29. John Guido, Chief of the Inspectional Services Bureau of the Police Department, described how the City's Narcotics Division was long regarded as the best squad of detectives until the Knapp Investigation put some 60 of its 80 members behind bars. T. 576-77. The City is not required to rely, moreover, on departmental mechanisms to achieve its aims; it is entitled to opt for a centralized system of monitoring its employees' finances, even if the new procedure is less comprehensive than some departmental procedures. The extent to which the new system will be used, or will prove useful, is speculative. Yet, the fact that dishonest filers may lie on the forms seems likely to prove a useful aspect of the system. Experience has shown that prosecuting individuals for false statements in required filings is often more efficient and successful than prosecuting them for the misconduct or impriority they sought to hide; and in prosecutions for the underlying conduct, proof that the subject lied or withheld information is often potent evidence, especially as to the individual's intent.

If the centralized disclosure procedure mandated by LL 48 serves valid governmental objectives, then requiring information about spousal finances is necessary to make it effective. As the First Circuit stated in *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st

Cir. 1976), "[i]nformation about other members of the officer's household must also be revealed if the questionnaire is to have meaning." *See* T. 361, 376-79. Virtually every financial disclosure law enacted to date has required some disclosure of family finances. *See supra*, note 1. "[A]s a basic proposition, resources of a husband and wife are usually held in common, and the financial interests of a spouse are generally shared by the partner. A bookkeeping arrangement wherein one spouse holds sole title to a particular financial asset does not mean that the partner does not share an interest in the financial holding. . . ." House Select Comm. on Ethics, Legislative Branch Disclosure Act of 1977, H.R. Rep. No. 574, 95th Cong., 1st Sess. 23 (1977). "Failure to require disclosure of the financial holdings of a spouse . . . would render [LL 48] meaningless," because a filer "who wished to evade the financial reporting requirements of the law could easily funnel money and property to his or her spouse. . . ." *Id.* at 24 (citation omitted). These considerations justify the City Council's inclusion of spousal finances in the filing requirements of LL 48, despite the desire of some spouses to keep their finances secret from the filing employee.[13] Moreover, the required disclosure of spousal information to the filing spouse serves yet another purpose that seems compelling. It effectively requires the filing spouse to make himself or herself familiar with the nonfiling spouse's interests, and thereby become responsible for avoiding conduct that could improperly favor the nonfiling spouse's interests.

B. *Disclosure to the Public*

[13] The aspect of LL 48 that permits public access to all financial information filed by employees

must be evaluated separately from the law's requirement that the forms be filed with the City. Public access to the information that must be filed under LL 48 would have a very substantial impact on the confidentiality aspect of privacy, as well as significant indirect effects upon recognized autonomy interests. Furthermore, the government has no need for such burdensome disclosure. Any legitimate need for public access—including press access—is served here by applying the statute to employees who are elected or hold policymaking positions. The plaintiff classes are, without exception, categories of civil servants appointed and promoted on the basis of competitive tests, who have no important policymaking authority. The public disclosure provision thus deprives plaintiffs of important rights while furthering no substantial interest.

1. *Impact on privacy of public disclosure*

The degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than disclosure to government officials. *See Nixon v. Administrator of General Services, supra,* 433 U.S. at 458, 97 S.Ct. at 2797; *Whalen v. Roe, supra,* 429 U.S. at 600-02, 97 S.Ct. at 877; *Planned Parenthood v. Danforth,* 428 U.S. 52, 80-81, 96 S.Ct. 2831, 2846, 49 L.Ed.2d 788 (1976); *O'Brien v. DiGrazia, supra,* 544 F.2d at 546. Disclosure to the government necessarily results in fewer persons learning of the facts disclosed than does public disclosure, which potentially reaches everyone. Disclosure to the government serves identifiable needs that limit both the persons to whom disclosure is made and the purposes for which they may use the information disclosed. By contrast, even if public disclosure is seen to

serve identifiable needs, those needs do not limit the persons to whom, or the purposes for which, disclosure is made. Any person may obtain and use publicly disclosed information, and for any purpose, however improper. Government officials generally lack familiarity with a particular employee's privacy concerns, and are constrained in using private information by legal, ethical, and practical considerations, including the need to avoid harming employee morale. Public disclosure will provide access to individuals particularly interested in the filer's privacy concerns, as well as to the press and other commercial interests bent on exploiting the information and relatively unconstrained in doing so. The mere fact that private information is available on demand to individuals who know what is sensitive and how to exploit it adds greatly to the inhibition, anxiety, and embarrassment that the same disclosure might cause if restricted to the government. T. 104-111, 243.

Plaintiffs presented several examples of how public disclosure would adversely affect autonomy interests, particularly the recognized interest in controlling one's family life. An individual (or his spouse) wanting to project an image of modest financial means could be exposed as having substantial wealth. Other filers would be unable to avoid exposing their relative impecunity. Exposure of "the truth" could prevent filers and their spouses from choosing life styles that they believe to be beneficial to themselves or to their children. T. 238-41. Given the broad scope of disclosure ordered by LL 48, moreover, public filings will reveal in some instances facts that could damage a variety of associations and relationships, ranging from family relationships to friendships and participation in fraternal and religious activities. *See,*

e.g., T. 239-45, 272-82. Nor is it possible to know in advance the many effects of public disclosure upon the filer's autonomy interests. For example, while the requirement that a filer reveal the address of certain real property he or she owns primarily affects a confidentiality interest, filers will have to avoid owning homes if they wish to avoid revealing their residence or summer addresses.

Public disclosure will directly and materially affect the confidentiality interests of filers and their spouses. Among those likely to use the forms are insurance salesmen seeking customers, T. 423, family members or neighbors seeking knowledge of the filer's financial capacity for a variety of purposes, T. 272-77, former spouses seeking to determine ability to pay alimony, T. 427, business organizations seeking investors or customers, public interest or other charitable organizations seeking contributions, and commercial interests seeking to expand mailing lists, T. 143. As noted above, public disclosure may lead to embarrassment that one lives above or below one's means, and will reveal many associations. The impact will be felt with respect to the disclosure of virtually every class of financial information specified on LL 48—sources of outside income, *e.g.*, T. 295, 345, gifts and reimbursements, *e.g.*, T. 325, amount and address of real property, *e.g.*, T. 551; T.D. 178-79, identity of creditors and amount of debt.

Filers will also lose the power to minimize specific and reasonable fears for their own safety, their family's safety, and the security of their property. T. 327-28, 532; T.D. 178-79. Police officers are particularly concerned that their home addresses must be revealed, if they own homes, thereby exposing

themselves and their families to possible attack by criminals whom they investigate, apprehend, or testify against. T. 327-28, 434-35, 456, 532. A government investigator called by the defense to support the need for LL 48 confirmed that policemen commonly take extreme measures to keep their addresses private; he said that he, too, would be reluctant to make his address available to individuals whom he had helped send to prison. T.D. 178-79. The law also directs the City Clerk to retain the forms until two years after the employee leaves public service; public exposure is thereby potentially extended over decades, increasing the risk of intrusions and the resulting anxiety. T. 243.

The press seems most likely to examine disclosures, and to use the information in newspapers, television, and radio stories. *See* T. 490 (experience in Alabama indicates press is a principal user of disclosed information). Uncontroverted testimony indicated that on several occasions the New York press used financial information about police and fire officers in humorous or ridiculing articles about the officers or their spouses, occasionally with painful consequences to the individuals concerned. T. 84, 139-40, 244, 305, 426, 428-31, 489, 528-29, 534; T.D. 203-04 (testimony of Inspector Kotch). Press exposure of private facts is perhaps the single most persistent danger to the privacy of Americans. The right to privacy has from its inception reflected a desire to protect sensitive, personal information from an intrusive and sensationalist press. *See* Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890); Note, *The Right to Privacy in Nineteenth Century America*, 94 Harv.L.Rev. 1892 (1981). Our nation's free and vigorous press, however, will not and must not be

restrained in the lawful pursuit of even the most tasteless aims. Consequently, any protection to be afforded civil servants from press exposure having no legitimate public purpose must take the form of protecting private material from required public disclosure. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 728-30, 91 S.Ct. 2140, 2148, 29 L.Ed.2d 822 (1971) (Stewart, J., concurring) (national security best preserved by avoiding disclosures, not by imposing restraints on press).

Defendants argue that the privacy interests affected by LL 48 are adequately protected by the statute's mechanism for permitting individuals to apply for protection of private information. That mechanism, however, will not prevent, and in some ways will exacerbate, invasions of legitimate expectations of privacy.

LL 48 requires that all information specified on the form be supplied in full, regardless of whether the individual filing considers the information to be private. The filer must flag each item he considers to be private, and must provide to the City a full explanation, in writing, of why "the item is of a highly personal nature." His privacy claims will not be adjudicated, moreover, until a request for public inspection is made of the City Clerk; the claims may therefore have to be repeated each year, for years, before they are actually adjudicated. When the privacy claim is adjudicated, the ordinance provides three factors for the Board of Ethics to consider: "(a) whether the item is of a highly personal nature; (b) whether the item in any way relates to the duties of the positions held by such person; (c) whether the item involves an actual or potential conflict of interest."

The Board is to make its determination in writing, and to forward it to the City Clerk, who is then to make available all information but that which the Board has excepted.

The standards provided to the Board of Ethics afford no assurance that requests by filers to keep information private will be granted, even when no need exists for public disclosure. The evidence demonstrates that plaintiffs harbor expectations of privacy for a variety of reasons that may be strongly felt but are unlikely to be deemed "highly personal." A father's wish to bring up his children without letting them know he is relatively wealthy, for example, or a filer's desire to avoid being solicited by salesmen, may not be deemed "highly personal." If so, disclosure follows automatically even though the information involved, such as the precise amount of a person's assets or his home address, has nothing to do with the filer's duties and poses no threat of conflict of interest.

Whatever value the statutory mechanism may have is negated by the indefinite delay that occurs before a claim of privacy is resolved. The Board of Ethics rules upon such claims only after a member of the public seeks to inspect the filing of the employee seeking protection against public disclosure. The filer therefore will not know whether details about himself or his spouse will be protected or exposed to the public until a request for inspection is made, and the Board of Ethics rules. During that period of uncertainty, the filer and his spouse must live with the continuing possibility of public disclosure. As Dr. Levin testified:

> If a person fills out this form, immediately there is a fear that there may be disclosure at some future time,

> some unknown time, [by] some unknown person, and one begins to limit the choices, the behavioral choices. One might change the way they reared their children, perhaps someone believes that children should not know that one is wealthy and want them to develop self-reliance, and then that freedom would be limited. It could be the other way: someone could have had a very difficult life, worked very hard, his parents were very poor and he wanted his children not to know that they really had very little money and not to have that stress. You would no longer have that freedom because you certainly want to appear trustworthy to your children. So that the kind of choices you would make would be limited.

T. 242-43; *see* T. 173-75 (testimony of Dr. Westin). The statutory mechanism does nothing to allay the anxiety caused by loss of control over, and indeed loss of knowledge about, what information will eventually be communicated to the public. T. 104 (testimony of Dr. Westin); T. 243 (testimony of Dr. Levin). In Dr. Westin's words, the mechanism would have plaintiffs "wondering day by day whether somebody will ask for this and not knowing in advance whether the Ethics Board will accept or reject their [privacy] claim until the moment at which they are placed in jeopardy." T. 175.

Furthermore, the requirement that employees detail in writing their privacy claims will in many cases condition the opportunity to avoid one invasion of privacy on accepting a second, even more intrusive invasion. The reasons financial information may be private or personally embarrassing will almost always be more personal and private than the information itself. *See* T. 175. "Moreover, all privacy claims must be decided in writing, and a person losing a privacy

claim will be forced to litigate or (unless regulations are adeopted providing otherwise) suffer the revelation of both the information and the fact that the privacy claim was rejected." *Slevin v. City of New York*, 477 F.Supp. 1051, 1058 (S.D.N.Y. 1979).

Finally, the privacy mechanism of LL 48 has the effect of placing in special jeopardy persons who succeed in obtaining protection from disclosure of particular items:

> Since their reports will be publicly available except for material deemed protected, the public will be placed on notice that [a specific] aspect of the financial lives of these individuals is "highly personal." That the aspect of their lives that is withheld will have been found to have no relationship to their duties, or to raise no actual or potential conflict of interest, seems unlikely to guaranty that no effort will be made by members of the public to discover the underlying facts. Indeed, some investigators may be more interested in uncovering non-job related "highly personal" facts than in examining less intensely personal information, however job related.

Slevin v. City of New York, 477 F.Supp. at 1058. The "privacy mechanism" will therefore have the effect of flagging "highly personal" aspects of a peson's life to the public, thereby inviting focused intrusions by the press. The threat of public disclosure of the specific areas of an individual's life that involve highly personal matters seems an especially grave invasion of privacy, and further limits the utility and significance of the privacy mechanism.

2. *Need for public disclosure under LL 48*

Public exposure of the financial affairs of public officials, candidates for elective offices, and government employees may serve important legislative goals. Our national, state, and local governments rely upon voter participation concerning numerous subjects. The public acts as a legislature in some circumstances, voting in referenda on various issues. In these instances, legislatures are justified in mandating public disclosure of all the information a legislature would need to know. The public also votes to elect persons to executive, legislative, judicial, and administrative offices, at all levels of government. A legislature acts reasonably in mandating public disclosure of information necessary or even arguably helpful to the elective process, including information about the individuals seeking office. The essence of elective office "consists in putting before the voters every conceivable aspect of [one's] public and private life. . . ." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, 91 S.Ct. 621, 626, 28 L.Ed.2d 35 (1971). Public disclosure under LL 48 expressly applies to the Mayor, members of the City Council, the Comptroller, the Borough Presidents, and candidates for those offices. But the financial information sought from the plaintiff classes is neither necessary nor relevant to any identified, public legislative function, and no member of the plaintiff classes is an elected official.

The public's need to know extends beyond the vast disclosures justifiable by the public's law-making and voting functions. The City argues that public confidence in the integrity of fire and police officers could be increased by public disclosure pursuant to LL 48, because the public (including the press) could thereby

monitor and investigate corruption and conflicts of interest, and because of the belief that disclosure will deter the officers covered by LL 48 from corrupt or unethical acts. The City contends, more broadly, that public disclosure is justified as to employees who earn more than $30,000, because the public has a special interest in its own employees, particularly those with relatively high salaries. "Salary is directly related to the importance of the functions of the employee and of the degree of reliance which is placed upon the integrity of their discharge, even though there are other parameters. Thus a measure of the danger posed by the opportunity to exercise a conflicting interest is furnished by the salary of the position." Defendants' Post Trial Memorandum at 8. Finally, and most broadly, the City claims that public disclosure under LL 48 increases the public's knowledge of matters relevant to government, and is therefore supported by the public's "right to know" of matters that make for an informed citizenry. None of these grounds provides substantial justification for public disclosure of the financial facts of plaintiffs' lives.

a. *Need to control corruption and conflicts of interests.*

The suggestion that the public will investigate corruption or conflicts of interest among civil servants such as plaintiffs has no evidentiary basis; while the press frequently focuses on the activities and ethics of elected and policymaking officials, the task of investigating civil servants is generally one delegated to and carried on by government personnel. The relevant question, with respect to the possibility of increased exposure of improprieties or increased deterrence, is not whether public disclosure will ex-

pose or deter conflicts of interest, but whether it will expose or deter significantly more effectively than disclosure to the government. Furthermore, that judgment must be made in the proven context of a City whose employees are separately governed by an array of laws and procedures designed to prevent and deter corruption and conflicts. *See Slevin* Plaintiffs' Memorandum of Law at 23-24 (statutes collected).

The City made no attempt at trial to establish that public disclosure of the information secured from plaintiffs by LL 48 would enhance to any extent the investigation or deterrence of corruption or conflicts. Indeed, the City's principal witnesses explicitly disclaimed any such result. Inspector Guido, the officer in charge of investigating Police Department corruption and conflicts of interest, frankly conceded that the interests in detection, deterrence, and prevention of corruption or conflicts of interest will be fully served by disclosure of the information to his department. T. 627-28. Fire Inspector General Kotch testified to the same effect:

> Speaking as an investigator, I would . . . say it wouldn't impede me if [the information] was just available to investigative agencies and not to the public; although [I am] aware . . . that the Mayor or the City Council may think that the public has a right to such access, fortunately I am not a politician and I don't really have a pulse on what the public wants, nor do I care what the public wants.

T.D. 102; *see* T.D. 184. Defendants took pains, in fact, to establish the efficiency and adequacy of the City's investigative apparatus. T. 555-59; Defendants' Post-Trial Memorandum at 13.

These concessions cannot be disregarded. They strongly buttress plaintiffs' claim that public disclosure of virtually every aspect of plaintiffs' finances could not conceivably lead to public scrutiny that affects public confidence in government. While certain limited types of information could in connection with some members of the plaintiff classes lead sporadically to investigations and revelations that serve some public end, the statute goes far beyond requiring disclosure of information bearing upon the workings of government. Rather, LL 48 adopts the technique of systematically, and indiscriminately, ordering disclosure of all the financial facts about every person covered.

b. *Need for disclosure by higher-paid employees.*

The City seems primarily to rest its case for public disclosure of plaintiffs' finances on the notion that the public has a special interest in knowing about those public employees in jobs entailing a high degree of trust, and that the salary level of $30,000 is a fair "measure of the danger posed by the opportunity to exercise a conflicting interest.... The legislative judgment has been that the threat is significant enough to warrant disclosure at the $30,000 level." Defendants' Post Trial Memorandum at 8.

The notion that the public has a special interest in knowing about public employees who hold positions with a high degree of trust is in principle valid. A tangible and substantial public need to know exists with respect to government employees exercising policymaking functions, not merely for the purpose of uncovering conflicts of interest, but also for the purpose of enabling the public to evaluate the motives

and biases that such individuals may possess. Leading administrators in the City's agencies, for example, are called upon to recommend or decide upon actions or great public importance, which decisions might arguably be affected by their financial position or interests. The public, therefore, could conceivably learn relevant facts about the job performance of such individuals by knowing about their finances generally. Some limits may be proper on the public disclosure of facts related to such individuals. But the broad, discretionary powers of policymaking officials make them potentially proper subjects of the complete financial disclosures sought by the City in LL 48.

This basis for public disclosure by policymaking officials does not, however, extend to public employees in general. Individuals and their families may not fairly be subjected, by virtue of public employment alone, to greater public scrutiny than other citizens. Americans do not lose their right to privacy by accepting public employment. Of course, a particular public employment may provide a legitimate nexus tending to justify public disclosure of otherwise private information. But a need for disclosure must be advanced, not merely the fact of public employment. *See Plante v. Gonzalez, supra*, 575 F.2d at 1134 & n. 25. *Compare City of Carmel-by-the-Sea v. Young, supra*, 85 Cal.Rptr. at 7, 466 P.2d at 232 (indiscriminate application of public disclosure law to all public employees unconstitutional) with *County of Nevada v. MacMillen*, 11 Cal.3d 662, 114 Cal.Rptr. 345, 522 P.2d 1345, 1350 (1974) (application of public disclosure law to high officials constitutional). *Cf. Elrod v. Burns*, 427 U.S. 347, 367-68, 96 S.Ct. 2673, 2686, 49 L.Ed.2d 547 (1976) (plurality opinion) (constitution permits patronage dismissals of policymak-

ing public employees but not of public employees in general).

The evidence demonstrates that policymaking in both the Fire and Police Departments is in the hands of the Mayor's appointees, and their hand-picked professionals in the highest departmental ranks. *See supra*, notes 11 & 12. The officer classes covered by LL 48 are engaged in implementing policy established by others. The Fire Department plaintiffs perform their duties literally in accordance with "the book"—*i.e.*, manuals and instructions that are issued by headquarters to govern their conduct in virtually all contingencies. T. 26-30; *Slevin* Plaintiffs' Proposed Findings of Fact (No. 11) at 5. While the police officers covered by LL 48 have considerable discretion in connection with their tasks, the discretion they exercise involves no general policy implications. T. 614-19. Their discretionary functions potentially subject some of them to the temptations of graft and corruption, but theirs are not the sorts of policymaking activities that make all the fiscal facts of their lives a proper subject of general public scrutiny.

The City seemed initially to argue that at least some members of the plaintiff classes have managerial positions, routinely making policy. *See* Affidavit of Deborah Rothman, Esq., Sept. 21, 1979, par. 6. In fact, some Deputy Chiefs in the Fire Department, and some Captains in the Police Department, serve by special assignment in high positions, apparently involving policymaking authority. But LL 48 has no mechanism for requiring only these individuals to disclose, and the City has abandoned any effort to rely upon these assignments as a basis for justifying

disclosure by all who earn more than $30,000. The City's post-trial position is that

> the issue of whether the members of plaintiffs' classes are "policy-members" or members of the City's managerial pay-plan, or merely execute the policies of others, is irrelevant and immaterial. It is difficult to conceive of a public employment, other than that confined to purely physical labor, or, in some instances, to tasks which are wholly clerical, in which there is no opportunity to defeat the public interest by a divided loyalty.
>
> It follows therefore that the "managerial" or "policy-making" role of an employee is immaterial to the final validity of the local law.... It is not necessary that the employee subject to disclosure be in a position to determine City policy; it is sufficient that he or she is in a position to implement that policy with respect to a significant number of employees.

Defendants' Post-Trial Memorandum at 7 & 36.

The power to implement public policy is certainly a matter that justifies public attention, and it is related as the City contends to the potential for corruption. But it no more justifies across-the-board, public disclosure of finances than does the potential for corruption alone. The economic interests of such persons are irrelevant to all issues other than potential corruption, and the record in this case establishes that public disclosure will not add materially to the investigative or deterrent value obtained by disclosure to the City's investigative agencies. The City's proposed justification would require public disclosure of the finances of public employees who direct a "significant" number of other employees even though they

exercise no policymaking authority and little discretion. The mere fact that one serves the public as a supervisor does not, however, make his financial life a valid subject of public scrutiny.

The City also argues that the salary level selected in LL 48 reflects a reasonable legislative judgment that should be enforced even though it might be both overinclusive and underinclusive of the persons whose finances should be disclosed. To support this proposition the City invokes the familiar doctrine that courts must defer to a legislature's decision to draw any reasonable and necessary regulatory line. *See Buckley v. Valeo*, 424 U.S. 1, 83, 103, 96 S.Ct. 612, 665, 675, 46 L.Ed.2d 659 (1976). Deference to a legislature's line-drawing is premised, however, on the particular line's relationship to the statutory purpose, and the lack of any practicable means for fixing the line more precisely. The line chosen by the City Council is only tangentially related to the statute's purposes, and wholly unnecessary.

In *Buckley v. Valeo* the Supreme Court upheld $10-and $100-per-contribution thresholds for campaign contribution record-keeping and reporting requirements. 424 U.S. at 82-83, 96 S.Ct. at 664. It also upheld a requirement that a political party receive at least five percent of the vote in the instant or previous election in order to qualify for general election funding. *Id.* at 103, 96 S.Ct. at 675. These thresholds differed fundamentally, however, from that at issue here. The use of a dollar figure for campaign contributions relates directly to the reasons for requiring disclosure. As the Court said, "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that

may be given in return." *Id.* at 67, 96 S.Ct. at 657. The constitutional challenge therefore was not directed at the reasonableness of using a dollar amount as an index of influence, but instead at the dollar level chosen. The Court said: "The line is necessarily a judgmental decision, best left in the context of this complex litigation to congressional discretion." *Id.* at 83, 96 S.Ct. at 665. Similarly, the requirement that a party receive five percent of the vote in the instant or previous general election in order to qualify for federal funding related directly to the purposes of the legislation. Congress stated a clearly legitimate interest "in not funding hopeless candidacies with large sums of public money," which "necessarily justifies the withholding of public assistance from candidates without significant public support." *Id.* at 96, 96 S.Ct. at 671. The Court found that "popular vote totals in the last election are a proper measure of public support." *Id.* at 99-100, 96 S.Ct. at 673. Again, the challenge was aimed at the percentage figure selected—a choice that the Court said "was for Congress to make," *id.* at 103, 96 S.Ct. at 675—and not at the propriety of using a percentage index to accomplish the stated goal.

In this case, the relationship between salary level and the objectives of a mandatory financial disclosure law is tenuous. The only evidence before the City Council and presented at trial proves that salary is a crude method for determining who will disclose; that the Council knew the $30,000 line was overinclusive in that it included crane operators and others in jobs having no public policymaking functions; and that the Council never determined exactly which jobs would be covered by the $30,000 line.[14] The Council knew also that LL 48 was underinclusive, in that it left unregulated such sensitive, policymaking positions as

all members of the Landmarks Preservation Commission, members (other than the Chairman) of the Taxi and Limousine Commission, and employees of the Fire and Police Departments concerning whom the strongest record of corruption exists. *See Slevin* Plaintiffs' Memorandum of Law at 25-26; *Slevin* Plaintiffs' Post-Trial Reply Memorandum 17-22. In fact, the City chose a line that was a mere guess as to the importance and sensitivity of the jobs covered, and by using a dollar amount the City picked a line that will, as salaries rise, automatically extend the coverage of LL 48 to new and unknown sets of employees.

The City's $30,000 threshold is not entitled to judicial deference for the additional reason that it is unnecessary. As Justice Holmes explained, in advocating judicial deference to legislative line-drawing, the reasonableness of arbitrary lines lies in their necessity:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the charge takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32,

41, 48 S.Ct. 423, 426, 72 L.Ed. 770 (1928) (Holmes, J., dissenting); *see Buckley v. Valeo, supra*, 424 U.S. at 83 n. 111, 96 S.Ct. at 665 n. 111.

The record establishes that the City Council had no need to draw an arbitrary line. LL 48 was carefully written to cover all the important elected and policymaking offices in City Government. It expressly applies to the Mayor, City Council President, City Councilmen, Borough Presidents, and Comptroller, and to all candidates for those positions. It also covers all the principal officers of every agency, members of all boards and commissions who serve for pay, and employees covered by the City's managerial pay plan. *See supra*, note 6. Only after covering all these offices does the statute seek to include all employees earning over $30,000. The $30,000 line cannot, therefore, be justified as necessary to include any of the elected or policymaking personnel in City government. To the extent the City Council believed that coverage of offices in addition to those expressly covered was necessary, it could have examined particular job categories and specified which ones were to be covered; or it could have delegated the screening task to the Board of Ethics, an agency already created to deal with conflict-of-interest problems. As the record of the City Council's deliberations demonstrates, the City refused both to do the work itself, or to delegate it.[15] Rather, it simply decided to draw an unnecessary line, only tenuously related to its objectives, and in ignorance of the relevant facs. Such a line is entitled to no special deference.

Congress recognized that a fixed, monetary line is neither sensible nor necessary in adopting the Ethics in Government Act of 1978 (the "Act"), Pub.L. No.

95-521, 92 Stat. 1851, which includes the financial disclosure statutes for the three branches of federal government. 2 U.S.C. §§701-09 (legislative personnel); 5 U.S.C.App. §§201-11 (executive personnel); 28 U.S.C. App. §§301-09 (judicial personnel). The Act provides a "comprehensive statute requiring full and complete public financial disclosure by high-level officials in all three branches of Federal government." S.Rep. No. 170, 95th Cong., 2d Sess. 42, *reprinted in* 1978 U.S.Code Cong. & Ad.News 4216, 4258. Congress defined "high-level officials" as certain enumerated officials and all officials attaining pay grade GS-16. The GS-16 grade is the third highest pay grade in a system differentiating salary in part "in proportion to substantial differences in the difficulty, responsibility and qualification requirement, of the work performed." 5 U.S.C. §5101(1)(B).[16] Congress selected GS-16 as a measure of the official duties covered, moreover, and not as a proxy for a certain salary level. Officials at a lower pay grade who, due to seniority, "earn more money than an employee at GS-16, step 1, will not have to file a financial disclosure statement. It is the level of an ... employee's responsibility, as determined by the grade at which he is classified, rather than the amount of pay, that is the determining factor." S.Rep. No. 170, *supra* at 110, 1978 U.S. Code Cong. & Ad. News at 4326. Congress also adopted this approach to avoid automatically extending coverage as salaries rise. "[T]he rate of compensation for [GS-16] will increase with inflation; thus, [by using GS-16 rather than salary,] more and more employees will not be covered by the public disclosure requirement over the years simply because the amount of money they are paid increases due to inflation." *Id.*

Nixon v. Administrator of General Services, supra, and *Whalen v. Roe, supra,* suggest that a similar degree of care is required in drafting all laws that adversely affect privacy. In *Nixon,* the Court emphasized the care taken by Congress in legislating and by the Administrator in establishing regulations for the screening of the presidential papers, 433 U.S. at 452-65, 97 S.Ct. at 2794, and specifically commended "the Act's sensitivity to appellant's legitimate privacy interests," *id.* at 465, 97 S.Ct. at 2801. Similarly, in *Whalen* the Court premised its deference to the legislative judgment underlying the challenged law in part on the ground that it was "a considered attempt" to deal with the drug abuse problem:

> It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other states.

429 U.S. at 597, 97 S.Ct. at 875. Like the statute upheld in *Nixon,* careful and effective "security provisions" foreclosed the possibility of public disclosure, *id.* at 600-02, 97 S.Ct. at 877, manifesting deliberate consideration of threatened privacy interests.

Thus, while the Constitution allows legislatures broad discretion in drawing necessary lines excluding and including persons in a statute's coverage, the City's selection of $30,000 as a coverage cutoff was neither reasonable nor necessary. The legislative record demonstrates that the $30,000 figure was regarded by every expert and legislator who testified as both overinclusive and underinclusive, and that

this imprecision was readily correctable. The $30,000 provision, in fact, was the single aspect of the law that was questioned by representatives of the Mayor, the Board of Ethics, and the Corporation Counsel, who proposed an amendment to enable the Council to overcome the statute's imprecision by allowing the Board to exclude or include job categories in the process of administering the Act.[17] But the Council refused either to delegate or to accept the task of determining whether financial disclosure by persons within a given job category would further some public purpose sufficiently to warrant the resulting invasion of privacy.

c. *The public's right to know.*

The City also justifies LL 48 on the general proposition that it helps insure an informed citizenry. The Supreme Court has recognized in several contexts the strong interest in maintaining an informed citizenry. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969); *Mills v. Alabama*, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966), *Lamont v. Postmaster General*, 381 U.S. 301, 306-07, 85 S.Ct. 1493, 1496, 14 L.Ed.2d 398 (1965); *New York Times v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964). Professor Emerson and others have suggested that these lines of authority provide a basis for a general right to obtain information for the purposes of personal fulfillment, seeking truth, collective decision-making, and effecting social change without violence or coercion. *See* Emerson, *Legal Foundations of the Right to Know*, 1976 Wash.U.L.Q. 1, 2 (authorities collected at n. 2); Note, *The Constitutionality of Financial Disclosure Laws*, 59 Cornell L.Rev. 345, 354-61 (1974). *Compare Redding v. Jacobsen*, 638 P.2d

503, 506-09 (Utah 1981) (discussing authorities); Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U.Pa.L.Rev. 271 (1971); Comment, *The Rights of the Public and the Press to Gather Information*, 87 Harv.L.Rev. 1505 (1974).

Whatever limitations should be placed on the "right to know" in other contexts, the interests that support such a claim operate with special force in connection with laws requiring financial disclosure by public officials. The public's claim to information in such cases is supported by a legislative determination of the propriety of its disclosure. But limits must be placed on this asserted right to know. A principle that would justify exposure to the public of all the information that could conceivably make citizens more informed would justify virtually any disclosure law, however insubstantial the need for disclosure and however substantial the privacy interests affected. Issues of public concern so permeate our lives that each of us is potentially a significant subject of public scrutiny. Public disclosure of the tax returns of all Americans, for example, would enable the public (including the press) to know about, investigate, and deter tax fraud by all other Americans. Yet, the need for such a law seems dubious, and the disclosures it would require would greatly compromise confidentiality and substantially affect recognized autonomy interests.

Right-to-know theorists have themselves suggested limits for public disclosure in articulating the reasons disclosures are justified. Emerson, for example, finds "a constitutional right in the public to obtain information from government sources necessary

or proper for the citizen to perform his function as ultimate sovereign." 1976 Wash.U.L.Q. at 16. The limitations implicit in this principle are precisely those suggested here: in order to perform the governing function, the public must have what it needs to legislate, to elect, and to monitor its policymaking officials; the public need not have private information about government employees who merely implement policy.

Indeed, the distinction between elected and policymaking officials on the one hand, and non-policymaking employees on the other, is supported by one of the principal cases relied upon to establish the public's right to know. In *New York Times v. Sullivan, supra*, the Supreme Court concluded that in order to preserve "the vigor and . . . the variety of public debate" a "public official" must be barred "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " 376 U.S. at 279-80, 84 S.Ct. at 720. The *Sullivan* Court did not, however, "determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule." 376 U.S. at 283 n. 23, 84 S.Ct. at 727 n. 23. This question was subsequently addressed in *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), where the Court found that "public official" includes "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." 383 U.S. at 85, 86, S.Ct. at 675. *Sullivan's* protection of the public's right to know limits a plaintiff's rights under the law of defamation only where the plaintiff's "position in government has

such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, *beyond the general public interest in the qualifications and performance of all government employees.*" 383 U.S. at 86, 86 S.Ct. at 676 (emphasis added). Regardless of whether some of the officer plaintiffs in this case would be deemed "public officials" in a libel action, *see Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (police officials treated as "public officials" in libel actions) (cases collected), the line drawn in *Rosenblatt* between "public officials" and other government employees is analogous to the distinction between policymaking and nonpolicymaking personnel. A perfect match between the two distinctions is not required to demonstrate that the public's right to know may be outweighed by the rights of individuals positioned below certain points in the hierarchy of government employees; to the contrary a variance is appropriate to reflect the greater need to protect the constitutionally guaranteed right to privacy, as opposed to the common-law right to sue for defamation. Moreover, even with regard to "public officials," a libel defendant is not entitled to the protection of the "actual malice" standard if the alleged falsehood does not touch upon the official's fitness for office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273, 91 S.Ct. 621, 626, 28 L.Ed.2d 35 (1971). In short, the "right to know," as reflected in the first amendment, has been found to justify limitations on rights under the law of defamation only with respect to publications about individuals with substantial public responsibility, and only when such persons are discussed in connection with public functions.

Privacy doctrine also inferentially supports the distinction between policymaking and nonpolicymaking employees in determining the propriety of public, financial disclosure. Thus, "newsworthiness" was early recognized as potentially a proper line between the public's right to know and the individual's right to be let alone:

> Although in their germinal article Warren and Brandeis do not expressly mention the first amendment, they recognize clearly the potential conflict between the individual's "right to be let alone" and the "legitimate interest to their fellow citizens" of *some* of the personal facts of the lives of *some* people. "The design of the law [of privacy]," they said, "must be to protect those persons *with whose affairs the community has no legitimate concern*, from being dragged into an undesirable and undesired publicity." Conversely, they urged that "[t]he right to privacy does not prohibit any publication of matter which is *of public or general interest*" and "to whatever degree and in whatever connection a man's life has ceased to be private, ... to that extent the protection [of privacy] is to be withdrawn."

Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 Rutgers L.Rev. 41, 54-55 (1974) (footnotes omitted) (emphasis original). A determination of what is "of public or general interest"—that is, of what is newsworthy—focuses "on whether or not the information is relevant to the public's governing purposes." *Id.* at 56. Thus " '[p]ublic interest,' taken to mean curiosity, must be distinguished from 'public interest,' taken to mean value to the public of receiving information of governing importance." *Id.* at 56-57.

Precisely this distinction is recognized in determining the reach of the "actual malice" standard:

> [A] conclusion that the ... malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Rosenblatt v. Baer, supra, 383 U.S. at 86-87 n. 13, 86 S.Ct. at 676 n. 13. As nonpolicy-making public employees, plaintiffs are not in positions that invite public scrutiny of their financial affairs or make those affairs relevant to the public's need to fulfill its governing functions. A less restrictive view of the public's right-to-know would disregard society's interest in protecting the privacy of citizens who happen to be employed by government.

Mere invocation of the public's right to know plainly cannot resolve its proper application in this case. "The proper boundaries of the right to know cannot be fixed by recourse to a single abstract principle." W. Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 Wash.U. L.Q. 25, 28. "Society does not choose merely between the 'good' of free speech or free press and the 'evil' of oppression. Rather, society is constantly selecting among competing values to establish its principles governing communication." *Id.* at 25. In his own advocacy of a right to know, Professor Emerson is careful to recognize the right to privacy as the most significant

limitation on the right to know. Emerson, *supra*, 1976 Wash.U.L.Q. at 20-23.

Our nation has recognized the valid interest in publicly disclosing information about or relevant to all aspects of government. Yet, public disclosure is limited in every sphere and at every level of government activity, to protect a variety of interests, among the most prominent of which is privacy. The Constitution mandates public trials in some cases, for example, for a variety of historical purposes. *See* U.S. Const. amend. VI; *see also* N.Y.Jud.Law §4 (McKinney 1968); N.Y.Civ.Rights Law §12 (McKinney 1976). The right to attend even a criminal trial, however, is not absolute. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n. 18, 100 S.Ct. 2814, 2830 n. 18, 65 L.Ed.2d 973 (1980). Furthermore, not every judicial proceeding is open to public scrutiny; and the need to protect privacy interests is high among the considerations that justify nonpublic proceedings. *See, e.g., United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 695 (7th Cir.1977) (exclusion of spectators during testimony of rape victim did not violate right to public trial); *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir. 1975) (exclusion of public constitutionally acceptable where necessary to maintain confidentiality of undercover narcotics agents); N.Y. Crim. Proc.Law §720.15 (McKinney 1971) (privacy afforded for youthful offender proceedings); 22(c) N.Y.C.R.R. §2501.2 (privacy for juvenile proceedings in Family Court); *see also Redding v. Jacobsen, supra*, 638 P.2d at 507 (right of courts to limit public disclosure of certain proceedings). Similarly, grand juries function in secret, in part to avoid disclosing prior to indictment the identities of and allegations against grant jury targets and witnesses.[18]

Our legislatures and their committees wield the investigative power, which is extremely broad, and has been recognized as a vehicle not only for preparing Congress to legislate, but also for securing information on matters of public concern. *E.g., McGrain v. Daugherty,* 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed.580 (1927). But that great power, too, has been limited because of privacy interests. As the Supreme Court stated in *Watkins v. United States,* 354 U.S. 178, 200, 77 S.Ct. 1173, 1185, 1 L.Ed.2d 1273 (1957) (footnote omitted):

> [T]here is no . . . power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals.

Cf. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 557-58, 83 S.Ct. 889, 899, 9 L.Ed.2d 929 (1963). The Freedom of Information Act, and analogous state and local laws, all contain provisions limiting public access where the information might compromise privacy interests. *See* 5 U.S.C. §552(b)(6); N.Y.Pub.Off.Law §89(2)(b) (McKinney Supp. 1981-82). And countless federal and state laws are on the books that expressly limit access to private information, for the purpose of protecting privacy. *E.g.,* 26 U.S.C. §§6103(a)(1) & 7213(a)(1) (tax returns confidential); 13 U.S.C. §9(a) (census information confidential); N.Y.Civ.Rights Law §50-a(1) (McKinney 1976) (personnel records of police officers confidential absent consent of officer); N.Y. Tax Law §697(e) (McKinney's Supp.1978) (tax returns confidential). *See generally* Givens, *The Law on Right to Financial*

Privacy, N.Y.L.J., Jan. 15, 1979, p. 1, col. 2.

These and other limits on public disclosure apply to governmental functions no less essential than the exposure and deterrence of corruption and conflicts of interest. They reflect national values that cannot be set aside by the mere invocation of ends so vague and uncircumscribed as the need to inform the public, or the public's right to know. Where tangible privacy interests are at stake, a need for public disclosure must be tangibly alleged and established, unless the public employees involved are engaged in policymaking and are therefore proper subjects of public scrutiny.[19]

3. *Conclusion*

Public disclosure of the information called for by LL 48 will seriously affect privacy interests, without advancing any substantial societal need. Plaintiffs are entitled to no less protection of their privacy than ordinary citizens; limits on their privacy rights cannot be justified on this record by special needs related to their actual employment. The federal courts must guard against the possibility that elected government officials faced with pressures for unlimited fiscal disclosure, particularly from the press upon which they depend for coverage and from which they regularly seek support, may too readily subject career government servants with no significant policymaking functions to the same degree of disclosure appropriate for themselves.[20]

V. *Severability of Filing Provisions*

[14] Plaintiffs argue that, if the Court invalidates LL 48's public disclosure provisions, the entire law

must be invalidated as it applies to plaintiffs, including its filing requirement. "The intent of the lawmakers" governs whether the remainder of a statute should be enforced after a substantial part of the law has been held invalid. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 56 S.Ct. 855 873, 80 L.Ed. 1160 (1936). In enacting LL 48, the City Council was well aware that the provisions permitting public disclosure might be ruled invalid while the filing requirements would be upheld. Just such a decision was rendered in *Hunter v. City of New York, supra*, which invalidated the public disclosure portions of LL 48's predecessor, LL 1. With knowledge of that possibility, the Council reenacted (and relettered "subdivision (h)") in LL 48, the former subdivision (e) of LL 1, which states:

> If any provision of this section shall be held invalid or ineffective in whole or in part or inapplicable to any person or situation, it is the purpose and intent of this section that all other provisions hereof shall nevertheless be separately and fully effective and that the application of any such provision to other persons or situations shall not be affected.

The Council's clear intent was that, in the event its new "privacy mechanism" did not save the public disclosure provisions from the fate they earlier met in *Hunter*, the filing requirements would be preserved.

Plaintiff's reliance on *Marchetti v. United States*, 390 U.S. 39, 58-60, 88 S.Ct. 697, 707, 19 L.Ed.2d 889 (1968), *Grosso v. United States*, 390 U.S. 62, 69, 88 S.Ct. 709, 714, 19 L.Ed.2d 906 (1968), and *Haynes v. United States*, 390 U.S. 85, 99-100, 88 S.Ct. 722, 731, 19 L.Ed.2d 923 (1968) is misplaced. Severing the disclosure provisions in those cases would have harmed interests Congress wished to advance by the

legislation at issue. In that posture the Court found that it could not know how Congress would assess the competing interests that would be advanced and harmed by severing the unconstitutional aspects of the law. *Marchetti v. United States, supra*, 390 U.S. at 59-60, 88 S.Ct. at 708. Plaintiffs here cannot seriously contend that upholding the filing provisions will harm any interests the City Council sought to advance in LL 48. The evidence established that limited disclosure might improve the City's ability to detect and deter corruption and conflicts of interest. Limiting disclosure to the City in these circumstances would in no way undermine that goal, or decrease public confidence in government. Accordingly, given the City Council's express intent that any unconstitutional aspect of LL 48 be severed, the remainder to operate in full force, the law is invalid only insofar as it permits public disclosure of the filings made by plaintiffs.[21]

Plaintiffs are awarded judgment, based on the findings and conclusions stated in this opinion, invalidating subdivisions (c), (d) and (e) of LL 48 insofar as they permit the City Clerk or any other government employee to make available for public inspection information filed pursuant to the law by members of the plaintiff classes.

The Clerk will enter judgment accordingly.

SO ORDERED.

FOOTNOTES

1. Accurate data on the number and scope of disclosure laws are not readily available. The most useful compilation seems to be *The Blue Book: A Compilation of Campaign, Ethics, and Lobbying Reform Laws*, prepared by the Council on Government Ethics Laws, edited by Carla Bailey, and introduced into evidence as Defendant Exhibit H. The Blue Book is a 26-page summary of data collected in a survey undertaken by the Council during the summer of 1979. The data collected are very general, and apparently were not verified. But they are useful nonetheless in providing a broad outline of existing legislation.

Questionnaires were sent to responsible officials in all 50 States and the District of Columbia; 38 responded, and 13 filed no response. Of the 38 responding jurisdictions, 28 had disclosure laws that covered "Officers" of state agencies or departments, 19 had laws covering state "Employees," 16 had laws covering municipal officials and/or employees, and 15 had laws covering county officials and/or employees. *Id.* 9. Most disclosure laws were broad in scope, covering all the usual forms of assets and financial transactions. *Id.* 11-12. Of the 28 jurisdictions with some form of disclosure legislation, 25 required disclosure of "Financial Interests of Official's/Employee's Spouse and Dependents." *Id.* 12. And virtually every jurisdiction reporting disclosure laws (27 of 28) made the information disclosed "Available to the Public." *Id.* 13. The responding jurisdictions were also asked to state the "Approximate Number of Filings Annually" under their disclosure laws. The total filings anticipated by those jurisdictions in 1979 was 109,619.

This number greatly understates the total persons affected, since 13 jurisdictions did not respond, since most filings cover more than one person, and because additional jurisdictions have adopted disclosure laws after the survey was conducted, including New York, which at that time reported no disclosure law. The state statutes are collected in Comment, 54 N.Y.U.L.Rev. 601 n. 1 (1979).

In addition to these state and local laws, the federal government's disclosure requirements are extensive, and apply to thousands of employees and their families. In 2 U.S.C. §§701-709, Congress required all federal legislators, their top aides, and candidates for Congress, to file extensive disclosure forms, including the assets of their spouses and dependent children, and made these forms available for public inspection. Similar provisions govern top executive personnel, including elected officials and candidates, appointed officials, top civil service and military personnel, 5 U.S.C.App. 201-211, and members of the federal judiciary and their federal officer or employee not included by these Acts to file. 5 U.S.C.App. §207 (a). *See infra*, text at note 16.

2. In early 1980, 15,885,000 Americans, or 17.5 percent of the total nonagricultural work force, were employed by federal, state, or local government. Bureau of the Census, *Statistical Abstract of the United Sttes* 411 (1980). Of the 15,971,000 employed by governments in October 1979, 2,869,000 were federal employees, 3,699,000 were state employees, and 9,403,000 were employees of local governments. *Id.* at 318.

3. The laws have generated a storm of litigation. *See, e.g., Duplantier v. United States,* 606 F.2d 654 (5th Cir. 1979), *cert. denied,* 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981); *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978) (cases cited at n. 8), *cert. denied,* 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). With limited exceptions, *e.g., Hunter v. City of New York,* 58 A.D.2d 136, 396 N.Y.S.2d 186 (1st Dept. 1977), *aff'd,* 44 N.Y.2d 708, 405 N.Y.S.2d 455, 376 N.E.2d 928 (1978); *City of Carmel-by-the-Sea v. Young,* 2 Cal.3d 259, 85 Cal.Rptr. 1, 466 P.2d 225 (1970), *Advisory Opinion on Constitutionality of 1975 P.A. 227* (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976), reviewing courts have upheld the laws. *See generally* cases collected in Note, 73 Mich.L.Rev. 758.

4. Brandeis and Warren sought to expand protection of privacy against "the gossip-monger," not against the lawful demands of government. *The Right to Privacy,* 4 Harv.L.Rev. 193, 198, 204 &n. 1, 206, 216 (1890). As they said: "The right to privacy does not prohibit any publication of matter which is of public or general interest." *Id.* at 214. In *Poe v. Ullman,* 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961), Justice Harlan distinguished between regulations that infringe a relationship that the state fosters, such as marriage, and those aimed at enforcing relationships that the state lawfully forbids.

5. The law makes any "intentional violation" a misdemeanor punishable by a year in prison and/or a fine of up to $1,000.

6. LL 48 requires the following individuals to file:

(i) the Mayor, City Council President, City Councilmen, Borough Presidents, and Comptroller, and candidates for such positions (Sec. 1106-5.0a, subd. 1,2); and

(ii) "[e]ach agency head, deputy agency head, assistant agency head, member of any board or commission other than a member of a board or commission who serves without compensation and each city employee who is a member of the managerial pay plan or whose salary is thirty thousand dollars a year or more. . . ." (Sec. 1106-5.0a, subd. 3).

7. Perhaps in a particular situation, even though a claim of valid privilege would be a defense, *see Garner v. United States, supra*, 424 U.S. at 667-68, 96 S.Ct. at 1189 (Marshall, J., concurring), the combined fears of prosecution for failure to file, of loss of a job, and of embarrassment resulting from public access to the forms, could be considered to have denied a filer the "free choice to remain silent." *Id.* at 665, 96 S.Ct. at 1187. But in that event the evidence supplied could not, under *Garrity*, be used against the filer in a criminal prosecution. Thus even in the hypothetical worst case, the rights safeguarded by the fifth amendment would not be lost.

8. One plaintiff testified that the form would require him to reveal that he is reimbursed for expenditures he makes in furtherance of fundraising activities for a parochial high school. T. 324-25. He did not suggest, however that he would terminate his association with the school, or that the underlying fund-raising activity would cease. Similarly, another plaintiff complained that LL 48 would require him to reveal reimbursements received from a fraternal organization of which he is secretary-treasurer. T. 270-71. Again, he did not object to publicizing his

association with the particular organization, but to publicizing his receipt of funds. Without a showing that a particular financial structure is an "indispensable condition" of protected activity, *cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588, 100 S.Ct. 2814, 2833, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring); *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634, 46 L.Ed. 2d 659 (1976), that is, that in its absence meaningful exercise of first amendment rights would be foreclosed, an incidental impact on such a structure is not proscribed. *See also* T. 270-71.

9. The opinions of some Justices support plaintiffs' assertion that the ninth amendment provides constitutional privacy protection. *See Griswold v. Connecticut*, 381 U.S. 479, 486-99, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965) (Goldbeg, J., concurring); see also Redlich, *Are There "Certain Rights . . . Retaine dby the People"?*, 37 N.Y.U.L. Rev. 787 (1962). None of the cases or academic sources written after Justice Goldberg's *Griswold* concurrence suggest, however, that the contours of ninth amendment privacy protection are any greater than the privacy protection offered by the fourteenth amendment, as firmly established in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

10. Professor Allan Westin, an expert witness, testified:

> [T]he boundaries of information between husband and wife are extraordinarily subtle and sensitive, especially at a time when women, and rightfully so, are having independent careers and independent income . . . [N]ow you often have two working partners, each with their monies and making decisions about what they

> disclose . . . [Requiring spouses to disclose their financial affairs to employee filers] raises very serious questions of family privacy and of spousal privacy and threatens the balances that have to be set very sensitively inside families. . . .

T. 186.

11. The offices of Fire Department Deputy Chief, Battalion Chief, and Medical Officer, have a virtually corruption-free history. T.20-22, 64-65; T.D. 78, 82, 87, 152 Officers employed in these positions have little or no contact with the public. T. 39-46, T.D. 58. Deputy and Battalion Chiefs principally perform line duties, supervising their fire companies and onsite firefighting activities. T. 22, 215-19, 266, 323. Their duties do not involve policymaking, and provide no significant opportunities for venality or conflict of interest. T. 25-31, 39-46, 54, 68, 95, 215-19, 222, 266, 288, 290-91, 323, 582-84, 590-95; T.D. 19-152. All of their duties are performed in the company of at least one aide, and often of several. Chief Officers rarely, if ever, pass on a matter that has not first been acted and reported upon by several other members of the Fire Department. Because tours of duty rotate, a matter passed on by one Chief Officer will often later come to the attention of another officer of the same rank; and all matters are routinely reviewed by superior officers. Consequently, a high risk of exposure attends the limited opportunities for corruption Chief Officers may have. Evidence presented by the City reveals that only six of the approximately 400 Deputy and Battalion Chiefs have duties that present them with any significant opportunity for corruption or conflict of interest. These individuals are easily identified by job description. T.D. 50-56. With the possible excep-

tion of these six individuals, policy in the Fire Department is set by the Commissioner and his immediate staff, none of whom is in a plaintiff class. Fire Department Medical Officers also have virtually no opportunity for corruption. Their principal duty is administering medical treatment to firemen injured in the line of duty, and determining an injured fireman's fitness for duty. They have no policymaking responsibilities. Rotation of tours of duty makes it highly improbable that any injured fireman will ever be seen twice in succession by the same Medical Officer. Although Medical Officers file the first report with respect to pension eligilibility of injured firemen, it is impossible for a Medical Officer acting alone to falsify a pension claim, given the administrative framework governing pensions. T. 64-70, 288-91; T.D. 38-42, 82.

Police Department Surgeons have few, if any, opportunities for corruption. T. 581-84. Fire Inspector Kotch testified that a Medical Officer could not falsify a pension claim, T.D. 137, the only area suggested by defendants to present Medical Officers opportunities for corruption. Defendants presented no credible evidence that Police Surgeons are differently situated. Their only witness on the subject was patently ignorant of the surgeons' responsibilities and opportunities for corruption. T. 590-95.

12. Evidence established that the New York City Police Department, including the titles of Captain and Lieutenant, has a history of pervasive corruption. T. 560; Defendant's Exhibit L, The Knapp Commission Report on Police Corruption (1972) ("Report"). Substantial opportunities for conflict of interest and corruption inhere in many of these jobs. T. 543-66, 572-74, 580, 611; Report at 61-71. In recent years, cor-

ruption in the Department, and among Captains and Lieutenants, has markedly diminished, but it persists. T. 540, 562-63, 614. Police Captains and Lieutenants have primarily administrative functions, supervising police activities at the precinct level. T. 614-19.

13. One potential problem arising from LL 48 is that the filer might be liable for failure to file a complete return if his or her spouse refused to supply the necessary information. Serious constitutional problems would be raised by a prosecution under such circumstances, and perhaps even by any punishment such as discharge. The City or the State Courts may, however, read into the law a "good faith effort" excuse for an employee's failure to provide spousal information. *See* Report of the Select Committee on Ethics, *supra*, at 24.

14. On June 22, 1979, Ms. Carson, an assistant to the Mayor, apparently instrumental in drafting the law, told the Committee preparing it for presentation to the Council that

> the use of a dollar figure is probably overinclusive as to some people and underinclusive as to others and we would like to request that the Director of Personnel in conjunction with any other parties who should be interested in this they'll give some attention to whether there are people who are covered by the $30,000 mark who shouldn't be and others who are not covered who ought to be . . .

City Council Committee on Standards and Ethics, Transcript of Meeting, June 22, 1979, at 6. Ms. Grad, Counsel to the Board of Ethics, indicated later at that meeting that "[w]e think the $30,000 figure is a good

way of measuring" employees properly covered. *Id.* at 40. But by July 9, 1979, at 11, Ms. Grad had reason to propose an amendment to LL 48 that would deal with the Council's failure to determine what groups were included by that figure and the law's resulting overinclusiveness. She stated that the Board of Ethics and Corporation Counsel

> are very much in favor of this amendment . . . [W]e, believe that even at the $30,000 threshold, there may be some titles of City employment which are not appropriate for covering and we did not conduct ourselves an examination of all the titles that would be covered but we did look at a few and one example that sticks in my mind is a crane operator who would be covered . . . [I]t's not at least apparent on its face that the purposes of the Act would be served by covering crane operators . . . [I]t's purposes of the Act would be served by covering crane operators . . . [T]his amendment . . . would provide the mechanism [by] which an established committee would be able to review the crane operators or what the particular duties of the title were and whether it was appropriate to cover that title and determine whether or not it would be served by that covering and therefore, no public benefit would be achieved in covering then they would have the authority to exclude that title from operation of the Act.

Id. at 2-3.

15. Well over half the final meeting on LL 48 concerned the problem of how to deal with the Committee's ignorance of whom the law would include. The record makes clear that neither the Administration that advanced the legislation nor members of the Committee that approved it made any study of the

titles covered. Positions in only two or three of the many City agencies were even briefly reviewed. City Council Committee on Standards and Ethics, Transcript of Meeting, July 9, 1979, at 5. Councilmember Katzman commented at one point:

> I am simply suggesting there are people earning $30,000 a year or more who really aren't in any position, which is one that is of confidentiality or that requires filing of financial disclosure statements.

Id. at 10-11. One witness asserted without contradiction by members of the Committee that, one day before LL 48 was passed by the Council, its proponents had no notion whose privacy it would invade and whether there was a rational need for it, *see id.* at 16 (testimony of Mr. Gordon); no one claimed to have endeavored to determine which City employees earned over $30,000 and whether there was reason to require them to disclose, let alone to require that the disclosures be public.

The amendment proposed by the Board of Ethics and the Corporation Counsel, that would have enabled the Board to except employees from coverage by LL 48, *see supra*, note 14, failed because no committee member moved that it be adopted. *Id.* at 24-25. This may have been due in part to the amendment's lack of standards to guide the committee that would rule on exemptions. *See id.* at 19. But opposition also was based on the fear that deliberate consideration of many of the job titles included by the $30,000 line would result in their exemption from coverage. Councilman Stern stated:

> I would like to express my serious concern with the passing of any piece of legislation which they provides

> in it terms for it being dismantled by allowing first the Committee, Administration officials and subsequently judges to in effect revoke it. . . .

Id. at 11. This desire to avoid a broad delegation, to prevent the law from being "dismantled," was entirely proper. But by refusing to delegate this task the Committee was then faced with the duty of addressing itself to the law's acknowledged overbreadth. It made no effort to do so, and the Council adopted the law with no further deliberation.

16. GS-16 includes only positions with the following duties:

> (A) to perform, under general administrative direction, with *unusual latitude for the exercise of independent judgment, work of outstanding difficulty and responsibility* along special technical, supervisory, or administrative lines which has demonstrated leadership and exceptional attainments;
>
> (B) to serve as the head of a major organization involving work of comparable level;
>
> (C) *to plan and direct or to plan and execute professional, scientific, technical, administrative, fiscal, or other specialized programs of unusual difficulty, responsibility, and national significance,* requiring extended training and experience which has demonstrated leadership and exceptional attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or (D) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

5. U.S.C. §5104(16)(A)-(D) (1976) (emphasis added).

17. *See supra*, notes 14 & 15. The Committee was apparently ignorant, even with respect to employees in titles it knew were covered by LL 48, of whether their duties warranted coverage:

> Councilmember Stern: What about a police captain?
> Ms. Grad: I am not sufficiently familiar with the operations of the police department to know whether police captains, what they ought to go on.
> Councilmember Stern: You don't know whether police captains should be exempt?
> Ms. Grad: If it is in the neighborhood of $30,000.
> Councilmember Stern: They do.
> Ms. Grad: I believe that presumptively they should apply to the law.
> Councilmember Stern: Presumptively?
> Wouldn't you know? Should we have the Police commissioner or the Corporation Counsel come in here?

Transcript of July 9 Meeting at 11-12.

18. *See* Fed. R. Crim. Proc. 6(e). Two of the four reasons generally considered to support grand jury secrecy are: "To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted [and] [t]o encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405, 79 S.Ct. 1237, 1243, 3 L.Ed.2d 1323 (1959) (Brennan, J., dissenting).

See also Fed.R.Civ.P. 26. Rule 26 permits discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [u]nless otherwise limited by order of the

court in accordance with these rules." Thus irrelevant matters, or matters relevant but privileged according to the Federal Rules of Evidence, are not discoverable. Moreover, the courts possess broad discretion to deny discovery entirely even of relevant matters, or to limit discovery by subject matter, by method or terms, by who has access to material discovered, or by sealing discovered material in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c).

19. Judge Gesell of the District Court for the District of Columbia has said:

> In this immediately post-Watergate period, the view exists that conflicts of interest can be expunged by forcing intimate disclosures from those dealing with or acting for the government. Within limits this may be sound, but we must beware lest excessive zeal in this direction destroy more precious fundamental values. People, even people working for the government, have within reason the right to be left alone.

American Fed'n of Gov't Employees v. Schlesinger, supra, 443 F.Supp. at 434.

20. One Councilmember thus frankly explained his vote just before LL 48's enactment:

> Very briefly, I'd like to explain my vote. I have always opposed the concept of this kind of legislation, because I don't think that it is going to serve any great public service. It will pander to the newspapers and media, who are looking for gossipy bits of information. However, I'd be a political fool if I voted against this legislation, so I vote reluctantly aye with the reservations that I have indicated.

Transcript of July 9 Meeting at 42. *See* Paletz & Entman, *Media Power Politics* 249 (1981).

21. An argument could be made that severance should be denied because the City has made no provision for keeping confidential the information filed. That shortcoming is readily rectifiable, however, in that the information can be processed and filed with the City Clerk, as LL 48 now requires, pending the Council's passage of further legislation providing for security and limited access, if the Council deems such legislation necessary. The City Clerk, meanwhile, will be permitted to allow access to the City's Commissioner of Investigation or his authorized staff members, and to the investigative units in the Fire and Police Departments. As indicated above, plaintiffs have no substantial privacy expectations against disclosure of the mandated information to City officials engaged in some legitimate governmental function. These individuals, in turn, must treat the information with the same degree of confidentiality now accorded private information in the City's personnel records.

APPENDIX E—ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JAMES SLEVIN, MARY SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

-against-

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS as City Clerk,

Defendants.

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GREBHARDT, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Defendants.

MEMORANDUM AND ORDER
79 Civ. 4524(ADS)
79 Civ. 4627(ADS)

ABRAHAM D. SOFAER, D.J.:

Defendants have filed a motion for a new trial pursuant to Fed. R. Civ. P. 59(a) on the ground that one of the findings in the Court's November 24, 1982 Opinion in this case is manifestly erroneous. In that Opinion, familiarity with which is assumed, the Court held Local Law 48 of 1979, N.Y.C. Admin. Code §1106-5.0 ("LL 48") unconstitutional insofar as it permitted public disclosure of financial reports it required the plaintiff classes to file with the City. The finding challenged by this motion concerns the inadequacy of LL 48's privacy mechanism. *See* Opinion at 36-40.

Defendants' motion ignores the grounds on which the Court concluded that LL 48's privacy mechanism "will not prevent, and in some ways will exacerbate, invasions of legitimate expectations of privacy." Opinion at 36. For example, defendants do not address the Court's concern with the indefinite delay that attends the resolution of privacy claims under LL 48. *See* Opinion at 38-39. Furthermore, they fail to contradict substantially the Court's conclusion that the privacy mechanism conditions "the opportunity to avoid one invasion of privacy on accepting a second, even more intrusive invasion." Opinion at 39. The defendants do assert that privacy claims are always deleted from a filer's financial disclosure report before the report is made available to a member of the public, regardless of whether the privacy claim is upheld or denied. Affidavit of Powell Pierpoint (December 6, 1982) par. 13. While this procedure assures that a filer's reasons for making a privacy claim will not be publicly disclosed, it does not eliminate disclosure of reasons that must unavoidably take place before the Board of Ethics. The defendants do not challenge the Court's finding that "[t]he reasons financial informa-

tion may be private or personally embarassing will almost always be more personal and private than the information itself." Opinion at 39. Moreover, the fact that privacy claims are deleted from disclosure reports in no way assures that the making of a privacy claim will remain unknown, especially if the filer presses his privacy claim through litigation. Even where a privacy claim is upheld, the existence of deletions in a filer's report will confirm that a privacy claim was made and thus "have the effect of flagging 'highly personal' aspects of a person's life to the public, thereby inviting focused intrusions by the press." Opinion at 40.

Defendants appear to rely on data concerning privacy claims that have thus far been passed upon by the Board of Ethics. According to that data, 26 privacy claims have come before the Board following requests for public disclosure of certain financial reports. Of these claims, 16 have been upheld, 3 denied, 6 withdrawn and 1 "otherwise disposed of." Affidavit of Powell Pierpoint (December 6, 1982) par. 14. Three years experience with LL 48's privacy mechanism, however, hardly establishes reliable expectations about the volume of future privacy claims and their dispositions, especially since the experience does not include the privacy claims of members of the plaintiff classes. In any event, the data fail to establish the adequacy of LL 48's privacy mechanism. All three of the denied claims appear to have been based on privacy concerns (such as the desire to avoid commercial solicitations) expressly recognized by the Court as constitutionally significant, although unlikely to be deemed "highly personal" under LL 48's privacy mechanism. *Compare* Affidavit of Powell Pierpoint (December 6, 1982) par. 16 *with* Opinion at 33-35, 37.

The single aspect of the Court's finding concerning the law's privacy mechanism that may be misleading relates to filer notification of the Board of Ethics' rulings on privacy claims. At the conclusion of a paragraph describing how the statute's privacy mechanism fails to protect reasonable expectations of privacy that might not necessarily be "highly personal," the Court noted: "Moreover, because the law makes no provision for notification of the employee in question prior to release of the information to the public, the statute provides no assurance that judicial review of Board of Ethics decisions, even if available, would be timely to prevent disclosure." Opinion at 37-38. In fact, LL 48 does not provide for notification of a filer concerning a Board denial of his or her privacy claim. *See* N.Y.C. Admin. Code §1106-5.0(d)(4). Defendants' affidavits establish, however, that in practice such notification does take palce, thus affording a meaningful opportunity for judicial review. Affidvit of Denise L. Thomas, Esq. (December 6, 1982) par. 6; Affidavit of Powell Pierpoint (December 6, 1982) par. 11 & Exhibit C; Affidvit of James G. Greilsheimer, Esq. (August 30, 1979) par. 4. Inasmuch as the portion of the Court's opinion relating to the absence of statutory notification is inconsistent with actual practice under LL 48, it is ordered stricken. This change in no way undermines the Court's findings and conclusions as to the inadequacy of the law's privacy mechanism. The Court's reasons for finding the privacy mechanism inadequate do not relate to the availability of judicial review.

Finally, defendants' motion ignores the Court's fundamental conclusion that the public disclosure of plaintiffs' financial reports would advance no substantial societal interest. Opinion at 40-62. It is doubtful

that any privacy mechanism could justify the unnecessary public disclosure of plaintiffs' financial data permitted by LL 48.

Defendants' motion for a new trial is denied. The sentence contained on pages 37 and 38 of the Court's November 24, 1982 Opinion, beginning with the words "Moreover, because" and ending with the words "prevent disclosure", is hereby stricken.

SO ORDERED.

Dated: New York, New York
December 15, 1982

s/ Abraham D. Sofaer
ABRAHAM D. SOFAER
U.S. DISTRICT JUDGE

JUDGMENT OF SOFAER, J., DATED JANUARY 10, 1983

[Same Title]

Based on the findings and conclusions stated in the Opinion and Order in these cases dated November 24, 1982, subdivisions (c), (d) and (e) of Local Law 48 of 1979, N.Y.C. Admin. Code §1106-5.0 are declared invalid insofar as they permit the City Clerk or any other government employee to make available for public inspection information filed pursuant to Local Law 48 by members of the plaintiff classes.

Judgment is hereby entered accordingly.

Dated: New York, New York
January 10, 1983

s/ Abraham D. Sofaer
ABRAHAM D. SOFAER
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED 1/10/83
s/ Raymond F. Buighardt
Clerk

THIS PAGE INTENTIONALLY
LEFT BLANK

Supreme Court, U.S.
F I L E D
NOV 22 1983
ALEXANDER L. STEVAS
CLERK

Nos. 83-485 and 83-484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Respondents.

CAPTION CONTINUED ON NEXT PAGE

JAMES SLEVIN, MARK SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; FRANCIS T. P. PLIMPTON, as Chairman of the Board of Ethics; POWELL PIERPOINT and BARBARA SCOTT PREISKEL as members of the Board of Ethics; and DAVID N. Dinkins, as City Clerk,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of
The City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007
(212) 566-4289 or
566-4338

LEONARD KOERNER,
PAUL T. REPHEN,
Of Counsel.

QUESTION PRESENTED

Does the New York City Financial Disclosure Law, New York City Administrative Code, §1106-5.0, as amended by Local Law No. 48 of 1979, violate any constitutionally protected right of privacy of the petitioner classes?

TABLE OF CONTENTS

Statement of the Case 2

Facts 5

Argument 22

Conclusion 40

TABLE OF CASES

Page

Buckley v. Valeo,
424 U.S. 1 (1976) 34

Califano v. Jobst,
434 U.S. 47 (1977) 23

Carey v. Population Services International,
431 U.S. 678 (1977) 23

City of Akron v. Akron Center for
Reproductive Health, 76 L. Ed. 687 (1983) .. 23

County of Nevada v. MacMillen,
522 P. 2d 1345 (Sup. Ct., Calif.,1974) 36

Duplantier v. United States,
606 F. 2d 654 (5th Cir., 1979), cert. den.
449 U.S. 1076 (1981) 24, 35, 37

Fritz v. Gorton,
517 P. 2d 911 (Wash. Sup. Ct., 1974),
app. dism'd 417 U.S. 902 (1974) 35

Gideon v. Alabama State Ethics Comm.,
379 So. 2d 570 (Ala. Sup. Ct., 1980) 24, 36

Goldtrap v. Askew,
334 So. 2d 20 (Fla. Sup. Ct., 1976) 36

Griswold v. Connecticut,
381 U.S. 479 (1965) 23

Page

Greene v. McGuire,
683 F. 2d 32 (2d Cir., 1982) 32

Hunter v. City of New York,
58 AD 2d 136, 396 NYS 2d 186
(1st Dept., 1977), aff'd 44 NY
2d 708 (1977), 376 N.E. 2d 928, 405
NYS2d 455 ..... 9, 10, 28

Illinois Employees' Assn. v. Walker,
315 N.E. 2d 9 (1974),
cert. den. sub. nom.
Troopers Lodge No. 41 v. Walker,
419 U.S. 1058 (1974) 24, 36

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 29

Loving v. Virginia,
388 U.S. 1 (1967) 23

Meyer v. Nebraska, 262 U.S. 390
(1923) 23

Montgomery County v. Walsh,
336 A. 2d 97 (Ct. of Appeals, Md., 1975),
app. dism'd 424 U.S. 901 (1976) 24, 35

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 24, 36

O'Brien v. DiGrazia,
544 F. 2d 543 (1st Cir., 1976),
cert. den. sub. nom.
O'Brien v. Jordon,
431 U.S. 914 (1977) 35

Page

Opinion of the Justices to the Senate,
376 N.E. 2d 810 (Mass. Sup. Jud. Ct., 1978) .. 36

Paul v. Davis,
424 U.S. 693 (1976) 23

Pesale v. Beekman,
81 AD 2d 590, 437 NYS 2d 448
(1st Dept., 1981),
aff'd 54 NY 2d 707 426 NE 2d 483,
442 NYS2d 989 (1981) 32

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 23

Plante v. Gonzalez,
575 F. 2d 1119 (5th Cir., 1978),
cert. den. 439 U.S. 1009 (1979) 24, 35, 36

Plyler v. Doe, 457 U.S. 202 (1982) 29

Roe v. Wade,
410 U.S. 113 (1973) 23

Skinner v. Oklahoma,
316 U.S. 535 (1942) 23

Smith v. Organization of Foster Families,
431 U.S. 816 (1977) 23

Snider v. Thornburgh,
436 A. 2d 593 (Pa. Sup. Ct., 1981) 24

Page

Stein v. Howlett,
289 N.E. 2d 409 (Ill. Sup. Ct. 1972),
app. dism'd 412 U.S. 925 (1973) 35

Whalen v. Roe,
429 U.S. 589 (1977) 24, 34, 36

Zablocki v. Redhail,
434 U.S. 374 (1978) 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Nos. 83-485 and 83-484

JOHN J. BARRY, MARGUERITE V. BARRY and JAMES GEBHARDT, on their own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; and DAVID N. DINKINS, as City Clerk,

Respondents.

CAPTION CONTINUED ON NEXT PAGE

JAMES SLEVIN, MARK SLEVIN, BRIAN CLINTON, JOAN CLINTON, DR. STANLEY C. FELL, and FRANK D'AMICO, on their own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

CITY OF NEW YORK; NEW YORK CITY BOARD OF ETHICS; EDWARD I. KOCH, as Mayor of the City of New York; FRANCIS T. P. PLIMPTON, as Chairman of the Board of Ethics; POWELL PIERPOINT and BARBARA SCOTT PREISKEL as members of the Board of Ethics; and DAVID N. DINKINS, as City Clerk,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

(1)

These cases are class actions brought pursuant to 42 USC §1983 by New York City police officers (Barry v. City of New York), fire officers (Slevin v. City of New York), and their spouses challenging the constitutionality of New York City Administrative Code, §1106-5.0, as amended by Local Law No. 48 of 1979. The law requires candidates for City office, elected officials, agency heads, members of City boards and commissions who receive compensation, employees in the City's managerial pay plan and all other City employees earning annual salaries of $30,000 or more to file with the City Clerk annual reports disclosing certain financial interests, and makes such reports available for public inspection. The statute also contains a procedure by which a person required to file a financial disclosure report can assert a privacy claim against public disclosure of a portion or all of the information contained in the report.

The petitioner class in Barry consists of police officers of the rank of captain and above and their spouses. This class, out of a total force of 25,000 police officers, includes approximately 250 captains, 80 deputy inspectors, 40 inspectors, 20 deputy chiefs, 10 assistant chiefs, 5 bureau chiefs and 1 chief of operations. All ranks above the rank of captain are non-civil service and are appointees of the police commissioner. The Barry class also includes lieutenants designated as supervisors of detective squads and/or special assignment, and police surgeons. Police surgeons are physicians who are members of the uniformed force and treat police officers and determine their fitness for duty.

The petitioner class in Slevin consists of battalion chiefs, deputy chiefs and medical officers of the Fire Department and their spouses. At the time the litigation was commenced, the Fire Department employed approximately 80 deputy chiefs, 280 battalion chiefs and 10 medical officers out of a total force of 9,500 firefighters. The

primary duty of deputy chiefs and battalion chiefs is to supervise firefighting operations. Battalion chiefs supervise five to eight fire companies, and deputy chiefs supervise three or four battalions. Medical officers, like their counterparts in the Police Department, supervise the treatment of firefighters and determine their fitness for duty.

In addition to their firefighting responsibilities, battalion chiefs and deputy chiefs have broad responsibility for supervising fire inspections within the areas of their commands (Slevin, Joint Appendix, pp. 391-393, 399-404). In addition, chiefs hold important supervisory positions in the Fire Department's Bureau of Fire Prevention, which inspects major buildings and structures, and in its Maintenance and Communications Divisions, whose responsibilities include the purchase of new equipment and spare parts (Slevin, Joint Appendix, pp. 377-381, 396-399).

Facts

(1)

Legislative History of §1106-5.0

Administrative Code, §1106-5.0 was initially enacted by the City Council in 1975 (Local Law No. 1 of 1975). As originally enacted, §1106-5.0 required the Mayor, the City Council President, the members of the City Council, the five Borough Presidents, the City Comptroller and declared candidates for those positions, as well as each commissioner or agency head, assistant commissioner or assistant agency head, board member, and city employee whose salary was $25,000 or more, to file with the City Clerk not later than June thirtieth of each year a report disclosing certain financial interests.

Each person filing a report was, and after subsequent amendments to the statute still is, required to list the following items on behalf of himself or herself and his or her spouse (§1106-5.0, subd. b):

The name, address and type of practice of any professional organization in which the person reporting or his spouse was an officer, director, partner, proprietor, employee or advisor from which income of $1,000 or more was derived during the preceding calendar year.

The source of any income of $1,000 or more received during the preceding calendar year for services rendered.

Any capital gain from a single source of $1,000 or more other than from the sale of a residence occupied by the filer.

Reimbursement for expenditures of $1,000 or more in each instance.

Honoraria from a single source in an aggregate amount of $500 or more and any gift in the aggregate amount of $500 or more from any single source received during the preceding year.

Each creditor to whom the person reporting or his spouse was indebted for a period of ninety consecutive days or more during the preceding calendar year in an amount equal to or exceeding $5,000.

Each investment or parcel of real estate in which a value of $20,000 or more was held at any time

during the preceding calendar year based on its cost or if acquired by means other than purchase, its estimated value at the time of receipt.

The identity of each trust or other fiduciary relation in which a beneficial interest was held during the preceding calendar year having a value of $20,000 or more.

The statute does not require the filer to disclose the precise amount of the income, investments and indebtedness items required to be disclosed. Rather, it requires only approximate disclosure within broad dollar ranges. (§1106-5.0, subd. b (6)(a)(b)(c)) Thus, with respect to income derived from services rendered, including services rendered to professional organizations, reimbursements or capital gains other than from the sale of a personal residence, the filer checks an appropriate box on the report indicating whether the income received by him or his spouse was at least $1,000 but less than $5,000, at least $5,000 but less than $25,000, at least $25,000 but less than $100,000, or in excess of $100,000. Similar

categories are provided for gifts and honoraria with the addition that the filer can check a box indicating that the gift or honoraria was between $500 and $1,000. With respect to indebtedness, the person filing the report checks the appropriate box indicating whether his or his spouse's debt was at least $5,000 but less than $25,000, at least $25,000 but less than $100,000, at least $100,000 but less than $500,000 or was $500,000 or greater. Lastly, with respect to investments, trusts and fiduciary relationships, and real property holdings, the categories are: at least $20,000 but less than $100,000, at least $100,000 but less than $500,000 and $500,000 or greater. Intentional violations of §1106-5.0 constitute a misdemeanor punishable by imprisonment for not more than one year or a fine not to exceed $1,000 or both (§1106-5.0, subd. g).

Local Law No. 1 of 1975 made the financial disclosure reports available to taxpayers. Unlike the law now being challenged, however, it did not establish a procedure by which a person making a

report could claim that its public disclosure would invade his or her privacy.

(2)

In June 1975 a class action was commenced in the Supreme Court of the State of New York on behalf of all individuals in the competitive and non-competitive classes of the civil service of the City earning annual salaries of $25,000 or more, challenging the constitutionality of Local Law No. 1 of 1975, inter alia, on the ground that it violated the privacy rights of the class under the United States Constitution. That action was rejected by the State Supreme Court in Hunter v. City of New York, 88 Misc. 2d 562 (Sup. Ct., N.Y. Co., 1976). On appeal, the Appellate Division, First Department of the Supreme Court held that the City Council could enact a provision requiring that class of employees and their spouses to make public disclosure of their financial interests, but held Administrative Code, §1106-5.0 infirm on the ground that it did not afford a covered employee the opportunity to present a

claim that the public disclosure of an item contained in the report would unnecessarily intrude upon the employee's privacy. Hunter v. City of New York, 58 AD 2d 136, 396 NYS2d 186 (1977). The New York Court of Appeals unanimously affirmed the order of the Appellate Division, First Department on the opinion of that Court. 44 NY 2d 708, 376 N.E.2d 928, 405 NYS2d 455 (1977).

In 1979 the City Council acted to correct the constitutional infirmity in §1106-5.0 which was found to exist by the Court in Hunter. In addition, it made other changes with respect to its scope of coverage (Local Law No. 48 of 1979). The Council adopted a procedure whereby an employee could assert a privacy claim with respect to any items contained in his or her financial disclosure report. Any person required to file a report is permitted, at the time the report is filed or at anytime thereafter, except when a request for public inspection is pending, to submit a request to withhold any item disclosed therein from public

inspection on the grounds that such inspection would constitute an "unwarranted invasion of his or her privacy" (§1106-5.0, subd. d[1]). Privacy requests must be made in writing and must set forth the basis for the claim. The financial disclosure report form provides space for an individual to make a privacy claim and to set forth the basis for that claim (JA29-32).[1] Privacy requests are evaluated by the public members of the New York City Board of Ethics, a board consisting of three public members, in addition to the Corporation Counsel and City Personnel Director. The Board of Ethics is established by New York City Charter, Chapter 68 (§2600 et seq.) to render advisory opinions to City officers and employees with respect to questions of ethical conduct, conflicts of interest and other matters arising under that chapter of the City Charter (Charter, §2602, subd. [a]). In determining

[1]Numbers in parentheses preceded by "JA" refer to the pages of the joint appendix in Barry. Other numbers in parentheses refer to the appendix to the Barry petition.

whether public inspection of an item would constitute an unwarranted invasion of privacy, the Board of Ethics must consider the following factors (§1106-5.0, subd. d[2]):

> "(a) whether the item is of a highly personal nature;
>
> (b) whether the item in any way relates to the duties of the position held by such person [making the privacy request];
>
> (c) whether the item involves an actual or potential conflict of interest."

The Board of Ethics is empowered to establish procedures for consideration of privacy requests. The procedure, inter alia, permits the filer to appear before the Board in person or by writing to state the basis for the claim that the information should be withheld from the public (§1106-5.0, subd. d[3]).

In instances where a person has asserted a privacy claim, the disclosure report is sealed and kept in the office of the City Clerk. A privacy claim is not evaluated by the Board of Ethics unless

a member of the public requests permission in writing to inspect an item contained therein (JA 345). At that time, the City Clerk refers the request for public inspection and the financial disclosure report, including that portion of the report in which the filer states the basis for his privacy request, to the Board of Ethics for evaluation (JA 345). The City Clerk also notifies the employee that a request has been made to inspect his report and that the matter has been referred to the Board of Ethics (JA 346).[2] The employee is reminded of his right to appear before the Board, and is offered the opportunity to submit additional material in support of his claim (JA 346). Determinations by the Board of Ethics are in writing and set forth the reasons for the determination (§1106-5.0, subd. d[4]).

[2]Persons filing financial disclosure report forms are always notified when a member of the public seeks to inspect his or her report regardless of whether a privacy request has been claimed by the employee.

If the privacy claim is sustained, the parties are notified, and the disclosure report, with the item or items adjudged to warrant privacy protection deleted from the report, is returned to the City Clerk (JA 346). If the privacy request is not upheld, the person filing the privacy claim is so notified by the Board of Ethics and is afforded the opportunity to request a rehearing by the Board and to submit additional material (JA 347). He is also advised of his right to seek judicial review of the Board's determination (JA 347). The employee is allowed ten days to determine his course of action, thus affording him the opportunity to seek judicial relief, including injunctive relief, by way of a proceeding in state court. If the Board does not hear from the employee within ten days, the report is returned to the City Clerk and made available for public inspection without deletion (JA 347). That portion of the financial disclosure report in which the filer discusses the basis for the assertion of the

privacy claim is never made available for public inspection (347).

In addition to establishing a privacy procedure, Local Law No. 48 of 1979 contained several other amendments. Employees in the City's managerial pay plan were made subject to §1106-5.0 regardless of their salary, and the minimum salary level at which other City employees are required to file reports was increased from $25,000 to $30,000.[3]

The Board of Ethics has been called upon to make twenty-six determinations of privacy claims since the enactment of Local Law No. 48. Sixteen of those claims were sustained by the Board of Ethics, six were withdrawn by the employees and one was otherwise disposed of (JA 347). Only three privacy requests have been denied by the Board (JA 347). Those three requests were denied because the filers failed to provide the Board of Ethics with

[3]The City administration has recently transmitted to the City Council a bill which, if enacted, would increase the filing threshold from $30,000 to $42,000.

additional information supporting their claims (JA 349).

(3)

The Litigation Challenging Local Law No. 48 of 1979

On September 4, 1979, plaintiffs commenced the instant action on their own behalf and on behalf of others similarly situated. District Court Judge Abraham Sofaer granted a preliminary injunction prohibiting the City from enforcing §1106-5.0, as amended by Local Law No. 48 of 1979, with respect to the plaintiff classes.

Following hearings on these cases, the District Court concluded that §1106-5.0 was constitutional insofar as it required disclosure to City government, but unconstitutional with respect to public inspection of the plaintiffs' reports (41a-103a). It held that government access to the reports would help to root out corruption and conflicts of interest. The Court observed (70a):

> "Corruption and more subtle conflicts of interest are possible in each group of plaintiff employees. That no corruption has been proven among several groups of plaintiffs does not establish that improprieties have not occurred or would never be deterred or uncovered by the filings."

The Court also rejected the argument that the inclusion of information relating to the spouse's activity would significantly affect decisions to marry, procreate or to make other intimate family decisions protected by the Constitution (67a).

The District Court held that the public disclosure of the reports in the case of persons who are neither elected officials nor "policymakers" did not serve any useful public purpose (80a-93a). It also concluded that the financial disclosure reports would be made readily available to members of the public, including salesmen, neighbors, relatives, former spouses, and business and charitable organizations (74a).

The Court of Appeals

In addition to the appeal by the City, the petitioners in Slevin cross-appealed from that portion of the District Court's judgment which held that financial disclosure to the government was permissible. The Court of Appeals in unanimously upholding the statute in all respects, stated (12a):

> "We think the statute as a whole plainly furthers a substantial, possibly even a compelling, state interest. The purpose of the statute is to deter corruption and conflicts of interest among City officers and employees, and to enhance public confidence in the integrity of its government. * * * Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread, see Slevin v. City of New York, supra 557 F. Supp. at 919 n. 1, and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest."

The Court rejected the Slevin petitioners' contention that because of the Fire Department's corruption-free history, financial disclosure serves no legitimate purpose as applied to them, noting (14a):

> "In our view, the City Council could reasonably conclude that LL 48 [Local Law No. 48 of 1979, which amended Administrative Code, §1106-5.0] would help deter corruption and conflicts of interest in the Fire Department, despite its 'virtually corruption-free history.'"

With respect to the issue of public inspection of the reports, the Court stated (16a):

> " We do not think that the right to privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest. Nor do we think the release of information that is not 'highly personal' rises to the level of a constitutional violation."

After analyzing the statute's procedure for allowing an employee to assert a privacy claim with respect to any items contained in his or her report, the Court concluded (15a):

> "Unlike the district court, however, we think that the statute's privacy mechanism adequately protects plaintiffs' constitutional privacy interests."

It noted, moreover, that the City's interest in public disclosure of the reports "outweighs the possible infringement of plaintiffs' privacy interests."

The Court of Appeals agreed with the City's argument that public disclosure of the reports will encourage City agencies "to be aggressive in their efforts to police corruption" and will enhance public confidence in government. In this regard the Court found (20a):

> "In this case, we cannot say that it was unreasonable for the City Council to conclude that public disclosure would materially advance the City's attempt to prevent corruption and conflicts of interests."

The Court also held that public disclosure need not be limited to elected officials and those occupying "policymaking" positions. It also sustained the $30,000 threshold for filing, observing (21a):

> * * * the burden imposed by an imprecise classification, and by the broad nature of the required disclosure, is mitigated by the

statute's privacy mechanism, which permits covered employees to challenge the proposed release of irrelevant 'highly personal' information. Accordingly, we cannot say that the law is unconstitutionally overbroad or that it violates the constitutional right to privacy."

ARGUMENT

NEW YORK CITY ADMINISTRATIVE CODE, §1106-5.0 SERVES THE VITAL GOVERNMENTAL PURPOSE OF DISCOURAGING AND EXPOSING CORRUPTION AND CONFLICTS OF INTEREST. THE STATUTE DOES NOT VIOLATE ANY CONSTITUTIONALLY PROTECTED RIGHT OF THE MEMBERS OF THE PETITIONER CLASSES. THE CHALLENGED STATUTE SPECIFICALLY ESTABLISHES A PROCEDURE WHEREBY ANY EMPLOYEE REQUIRED TO FILE A FINANCIAL DISCLOSURE REPORT MAY AVOID PUBLIC INSPECTION OF ANY ITEM CONTAINED THEREIN BY DEMONSTRATING THAT THE ITEM IS OF A HIGHLY PERSONAL NATURE, IS NOT INDICATIVE OF A CONFLICT OF INTEREST, AND IS UNRELATED TO HIS OR HER DUTIES.

The New York City financial disclosure statute does not violate any constitutionally protected privacy right of the petitioner classes. This Court has long recognized a protected interest in being free from improper state action which directly impacts on personal autonomy or decision

making in the area of marriage, procreation, contraception, abortion and the creation maintenance and termination of the family relationship. See City of Akron v. Akron Center for Reproductive Health Inc., ____ U.S. ____, 76 L. Ed. 687, 700-701 (1983); Zablocki v. Redhail, 434 U.S. 374, 386, 387 n. 12 (1978); Califano v. Jobst, 434 U.S. 47, 54 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977), Paul v. Davis, 424 U.S. 693 (1976); Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 338 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Financial disclosure laws, however, do not implicate this aspect of privacy because they do not directly or substantially effect intimate family and personal

matters such as a decision to marry, beget children or maintain a family relationship. Plante v. Gonzalez, 575 F. 2d 1119, 1131-1132 (5th Cir., 1979), cert. den. 439 U.S. 1009 (1979); Duplantier v. United States, 606 F. 2d 654, 669-670 (5th Cir., 1979), cert. den. 449 U.S. 1076 (1981); Montgomery Co. v. Walsh, 336 A. 2d 97 (Ct. of Appeals, Md., 1975), app. dism'd 424 U.S. 901 (1976); Illinois Employees Assn. v. Walker, 315 N.E. 2d 9 (Sup. Ct., Ill., 1974), cert. den. sub. nom. Troopers Lodge No. 41 v. Walker, 419 U.S. 1058 (1974); Snider v. Thornburgh, 436 A. 2d 593, 598 (Sup. Ct., Penn., 1981); Gideon v. Alabama State Ethics Commission, 379 So. 2d 570, 572 (Sup. Ct., Ala., 1980).

In Whalen v. Roe, 429 U.S. 589, 605 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 457-465 (1977), this Court appeared to recognize a protected privacy interest in avoiding "unwarranted disclosures" of personal matters. In considering whether public inspection of the financial disclosure reports would violate this

confidentiality aspect of the privacy right, the Court of Appeals correctly observed (16a):

> "We do not think that the right to privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest. Nor do we think the release of information that is not 'highly personal' rises to the level of a constitutional violation."

Highly personal information contained in a financial disclosure report which is unrelated to the duties of the filer and which is not indicative of a conflict of interest is protected from public disclosure under the statute. Specifically, subdivision d(1) of §1106-5.0 permits an employee at the time the disclosure report is filed or at anytime thereafter, except when a request by a member of the public for inspection is pending, to assert that the public disclosure of any item or items contained in the report would constitute an unwarranted invasion of privacy. In determining whether the public disclosure of an item would constitute an

unwarranted invasion of privacy, subdivision d(2) of §1106-5.0 requires the Board of Ethics to consider:

> "(a) whether the item is of a highly personal nature;
>
> (b) whether the item in any way relates to the duties of the position held by such person;
>
> (c) whether the item involves an actual or potential conflict of interest."

The Court of Appeals concluded that this statutory procedure affords covered employees adequate protection from unwarranted disclosures, and noted that out of the twenty-six privacy requests that have come before the Board of Ethics for review since 1979 (16a):

> "***[s]ixteen were granted, six were withdrawn, and one was 'otherwise disposed of'. Only three privacy claims were denied, apparently because insufficient information was provided in support of the claims."

In view of the fact that the statute contains a procedure which protects against the

unwarranted disclosure of highly personal information and has been construed administratively in the great majority of cases in favor of employee requests for privacy, we respectfully submit that this case does not present any issue concerning the right of privacy which is worthy of review by this Court.

Moreover, public disclosure of financial interests is accomplished by a method which is least intrusive to the privacy interests of the covered officers and employees. The provision is narrowly drawn to serve only its intended purpose. Precise disclosure of every aspect of the financial status of an employee or his spouse is not required. The provision requires disclosure only with respect to those financial transactions which may be indicative of wrongdoing or conflicts of interest, i.e., gifts, loans, reimbursement of expenditures, income from services rendered, etc. In addition, disclosure must be made only when a particular transaction or interest exceeds a specified minimum amount.

Thus, for example, an investment need not be reported unless it is valued at $20,000 or more. The disclosure report is not a net worth statement, and the specific amount of a reportable transaction or interest need not be noted. A covered employee makes disclosure only within fairly broad dollar ranges.

The Court of Appeals further held that the City's interest in public disclosure "outweighs the possible infringement of plaintiffs' privacy interests" (19a). In Hunter v. City of New York, supra, 58 AD2d 136, 396 NYS2d 186, aff'd 44 NY2d 708, 376 N.E.2d 928, the Appellate Division of the State Supreme Court stated (at 57 AD2d 137) that the purpose of §1106-5.0 is to:

> "*** discourage and detect corruption and the appearance of corruption, avoid conflicts of interest and instill in the public a sense of confidence in the integrity and impartiality of its public servants."

The United States Court of Appeals held that the statute "plainly furthers a substantial, possibly even

a compelling, state interest" (12a). This Court has recognized a compelling state interest in the maintenance of an honest police force and civil service. Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977).[4]

Public disclosure of financial reports is particularly appropriate in the case of superior officers of police and fire departments. The members of the petitioner classes occupy the very

[4]The Court of Appeals ruled that §1106-5.0 must be analyzed under an intermediate standard of review or balancing approach, noting (11a):

"***an intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality aspect."

While we believe that §1106-5.0 meets any constitutional test, including the compelling state interest test, this Court, in Plyler v. Doe, 457 U.S. 202, 217-218 (1982), has indicated that legislation will be sustained under the intermediate standard of review if it "may fairly be viewed as furthering a substantial interest of the state." This would suggest that a balancing of the interests is not required under the intermediate level of review.

highest positions in their uniformed services and are responsible for making decisions, enforcing laws, and taking action which directly effects the lives, safety, and property of every person who lives and works in New York City. The Court of Appeals agreed with the District Court's finding that "[c]orruption and more subtle conflicts of interest are possible in each group of plaintiff employees" (14a). The concern addressed by §1106-5.0 is not limited to the blatant bribe, but relates also to other forms of inappropriate behavior or conflicts of interest. For example, a supervisor or his or her spouse may have investments or a mortgage in the area of his or her command. A police surgeon or Fire Department medical officer may receive payments from insurance companies hoping to sell injured or disabled officers policies to supplement their benefits. A person covered by the provision or his or her spouse may be receiving gifts, loans, honoraria or reimbursements for expenses from those he or she must police, regulate or

otherwise protect, or may have joint business interests or investments with such persons.

Public disclosure of financial reports acts as a prod to City government to be continually aggressive in its anti-corruption and conflicts of interest efforts. Agencies will be aware that if they do not vigorously investigate evidence of misconduct revealed by a report, then a newspaper, a public interest group or a concerned citizen that has access to the information can hold them accountable for their failure to act. Thus, public disclosure makes it more difficult for an agency to refuse to confront the problems of employee misconduct. The public, on the other hand, has a means by which to judge whether City government is making sincere efforts to guard against corruption and misconduct. More importantly, public confidence in its servants will be greatly enhanced because the reports will demonstrate that the vast majority of the officers and employees are honest. Dishonest officers and

employees may no longer rely on agency inaction to protect them from disclosure of misconduct. Intentional failure to report the information called for by the report constitutes a crime which is punishable by fine or imprisonment. A conviction for a violation of the reporting requirements of §1106-5.0 would likely result in an automatic vacatur of a police or fire officer's employment, pursuant to N.Y. Public Officers Law, §30, subd. 1(e). See Greene v. McGuire, 683 F. 2d 32 (2nd Cir., 1982); Pesale v. Beekman, 81 AD2d 590, 437 NYS2d 448 (1st Dept., 1981), aff'd 54 NY2d 707, 426 NE2d 483, 442 NYS2d 989 (1981). Thus, the prospect of criminal prosecution for intentional violations of the law and the consequential loss of employment upon conviction will tend to deter individuals who might have otherwise engaged in wrongful or questionable conduct, and can help insure that governmental services wil be provided (and, in the case of police officers and firefighters, the law will be enforced) in an even-handed and nondiscriminatory manner.

The Court of Appeals agreed with the City that public disclosure of the reports would have this salutary effect, holding (20a):

> "In this case, we cannot say that it was unreasonable for the City Council to conclude that public disclosure would materially advance the City's attempt to prevent corruption and conflicts of interest."

Financial disclosure need not, as petitioners maintain, be limited to those persons holding elective office or occupying "policymaking" positions. The threat of corruption and conflicts of interest are obviously not limited to persons exercising policymaking authority, and the public's concern with misconduct extends beyond elected and policymaking officials. The use of a specific salary threshold to trigger disclosure is not improper. In general, salary is directly related to the importance of the functions of an employee, and, therefore, unfaithful conduct by persons earning higher salaries is usually more damaging to society's interests than misconduct by those earning

low salaries. Significant numbers of New York City employees at the $30,000 level (and even below) occupy positions of great public trust.[5]

The determination whether financial disclosure should be required and the categories of employees to be covered by such a statute should be left to the appropriate legislative body. In Whalen v. Roe, supra, this Court stated at 429 U.S. 597:

> "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."

[5]The petitioners in the instant cases earn salaries which are substantially in excess of the $30,000 threshold. For example, deputy fire chiefs and deputy police inspectors earn between approximately $48,000 to $58,000, exclusive of overtime and fringe benefits. Police captains and Fire Department battalion chiefs earn between approximately $43,500 and $51,500, exclusive of overtime and fringe benefits.

Legislative classifications of this nature are controlling unless very wide of any reasonable mark. Buckley v. Valeo, 424 U.S. 1, 83, 103 (1976). The Court of Appeals concluded that both the categories of employees required to disclose and the nature of the disclosure itself is "mitigated by the statute's privacy mechanism, which permits covered employees to challenge the proposed release of irrelevant 'highly personal' information" (21a).

Financial disclosure provisions have withstood constitutional challenge because they serve an important public need for efficient and ethical conduct among public employees and instill public trust and confidence in government by assuring citizens of the impartiality and honesty of their servants. See Duplantier v. United States, supra, 606 F.2d at 671-673; Plante v. Gonzalez, supra, 575 F.2d at 1135; O'Brien v. DiGrazia, 544 F. 2d 543 (1st Cir., 1976), cert. den. sub. nom. O'Brien v. Jordon, 431 U.S. 914 (1977); Montgomery Co. v. Walsh, supra, 336 A.2d 97, (Ct. of Apps., Md., 1975)

app. dism'd 424 U.S. 901 (1976); Fritz v. Gorton, 517 P.2d 911 (Sup. Ct., Wash., 1974) app. dism'd 417 U.S. 902 (1974); Stein v. Howlett, 289 N.E.2d 409 (Sup. Ct., Ill., 1972) app. dism'd 412 U.S. 925 (1973); Illinois State Employees' Assn. v. Walker, supra, 315 N.E. 2d 9 (Sup. Ct., Ill., 1974), cert. den. 419 U.S. 1058 (1974); Gideon v. Alabama State Ethics Commission, 379 So. 2d 570 (Sup. Ct., Ala., 1980); Opinion of the Justices to the Senate, 376 N.E.2d 810, 818 (Sup. Jud. Ct., Mass., 1978); Goldtrap v. Askew, 334 So. 2d 20 (Sup. Ct., Fla., 1976); County of Nevada v. MacMillen, 522 P. 2d 1345 (Sup. Ct., Calif., 1974).

As noted in the above citations, this Court has consistently declined to review decisions upholding financial disclosure laws. At page 29 of the petition in Slevin, it is stated that a number of those denials took place prior to this Court's recognition of the confidentiality aspect of privacy discussed in Whalen v. Roe, supra, 429 U.S. 589 and Nixon v. Administrator of General Services, supra,

433 U.S. 425. They fail to note, however, that the denials of the petitions for certiorari in Plante v. Gonzalez and Duplantier v. United States took place after the decisions in Whalen and Nixon.

Duplantier is particularly noteworthy. In that case, the United States Court of Appeals for the Fifth Circuit sustained the Ethics in Government Act of 1978 (P.L. 95-521, which is set forth in 5 USC App. §201 et seq.; 2 USC §701 et seq.; 28 USC App. §301 et seq.). Duplantier concerned the application of that law to federal judges. The Ethics in Government Act requires that certain members of the executive, legislative and judicial branches of the federal government file annual financial disclosure reports:

> "***containing a full statement of assets, income, and liabilities, and those of their spouses and dependent children." (Duplantier v. United States, 606 F. 2d at 659)

The federal act makes the reports available for public inspection (28 USC App. §305; 5

USC App. §205; 2 USC §704), but unlike the statute challenged in the instant case, it does not require that the person filing the disclosure report be notified prior to public disclosure, nor may such a person assert a claim that the public disclosure of an item contained in the report would constitute an unwarranted invasion of privacy. The Court of Appeals in the instant case relied on Duplantier in stating (18a):

> "We note by way of comparison that courts have upheld financial disclosure laws that hit much closer to home and do not have any similiarly broad privacy mechanism."

At page 30 of the petition in Sievin, the petitioners incorrectly state that the issue:

> "*** presented in this case is whether every public employee and his/her spouse may be required, consistently with the Constitution, to reveal at large all personal information as a condition of employment." (Emphasis added.)

All that is at issue in this case is whether §1106-5.0 is constitutional as applied to the members of the petitioner classes, high ranking uniformed officers of the Police and Fire departments (Slevin petition, p. 2; Barry petition, p. 3). The provision does not mandate that "all personal information" be revealed, but rather only certain specified financial transactions by them and their spouses which might be used as covers for wrongdoing or conflicts of interest. Nor must all the information contained in the reports be "revealed at large". We have stressed throughout that a covered employee may avoid public disclosure of any highly personal item contained in the report which is unrelated to his or her duties and which does not indicate a conflict of interest, and that the vast majority of privacy applications which have come before the Board of Ethics for review have been decided in favor of the employee.

In view of the findings by the Court of Appeals that the statute serves very important

governmental interests and is sensitive to the legitimate privacy interests of the employees to whom it applies, we respectfully submit that review by this court is unwarranted.

CONCLUSION

The petitions for certiorari should be denied.

November 18, 1983

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for the Respondents
100 Church Street,
New York, New York 10007

LEONARD KOERNER,
PAUL T. REPHEN,
of Counsel.